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OKLAHOMA CRIMINAL REPORTS

VOLUME I

CRIMINAL CASES DETERMINED

IN THE

SUPREME COURT

AND IN THE

CRIMINAL COURT OF APPEALS

OF THE

State of Oklahoma

During the Period Beginning With Statehood
and Extending to February, 1909

HOWARD PARKER, State Reporter

THE LEADER PRINTING CO.
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1909

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OCT 25 1911

JUSTICES OF THE SUPREME COURT.

During the period covered by this volume.

*R. L. WILLIAMS	Chief Justice
JESSE J. DUNN	Justice
SAMUEL W. HAYES	Justice
MATTHEW J. KANE	Justice
JOHN B. TURNER	Justice

JUDGES OF THE CRIMINAL COURT OF APPEALS

During the period covered by this volume.

HENRY M. FURMAN	Presiding Judge
**H. G. BAKER	Judge
THOS. H. DOYLE	Judge

OFFICERS

CHARLES WEST	Attorney General
W. H. L. CAMPBELL	Clerk
W. T. FIELD	Marshal
S. O. DAWS	Librarian

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*Succeeded as Chief Justice by Justice Kane, on January 13, 1909

**Succeeded, upon resignation, by Thomas H. Owen, on June 22, 1909.

PREFACE

The Criminal Court of Appeals of the State of Oklahoma derives its origin and jurisdiction from the Constitution, which was formulated by the constitutional convention and submitted to and adopted by the people at the first state election, held on the 17th day of September, A. D. 1907. Under the provisions of the Enabling Act, by proclamation of the President of the United States, the State of Oklahoma was admitted into the Union as a sovereign state, on November 16, 1907.

Section 2, article 7,, of the State Constitution provides:

"The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law."

In accordance with the constitutional provision, the First Legislature passed a law entitled: "An act creating a Criminal Court of Appeals, and defining the jurisdiction of said court." And on May 18, 1908, this law received the approval of the Governor. This act contained the following provisions:

"Section 1. There is hereby created a Criminal Court of Appeals, which shall consist of three members, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of such court. The members of said court shall have the same qualifications as justices of the Supreme Court, and each of whom shall receive a salary of three thousand five hundred dollars per annum.

"Sec. 2. The Criminal Court of Appeals shall have exclusive appellate jurisdiction in all criminal causes appealed from county and district courts in this state. If in any cause appealed to the Criminal Court of Appeals, in which the construction of the Constitution of this state, or of the United States, or any act of Congress is brought in question, the said Criminal Court of Appeals shall certify to the Supreme Court of the state the question involving the construction of the Constitution of this state, or of the United States, or any act of Congress, for the final determination of the question so certified. Thereupon all further proceedings in said cause in the Criminal Court of Appeals shall await the decision of the Supreme Court upon such question. Upon the final decision of such question by the Supreme Court, said Supreme Court shall certify its decision on such question to the Criminal Court of Appeals, and said decision of such question by the Supreme Court shall govern said Criminal Court of Appeals. The Supreme Court shall give precedence to all questions certified to it by the Criminal Court of Appeals under this section.

"Sec. 3. The appellate and original jurisdiction of the Criminal Court of Appeals shall be invoked in the manner prescribed by law.

"Sec. 4. Said judges shall be appointed by the Governor, by and with the consent and advice of the Senate, and shall hold office until the first day in January, nineteen hundred eleven, at which time said court shall terminate, unless continued by the Legislature.

"Sec. 5. The judges of said court shall choose a presiding judge for said court from their number, who shall be presiding judge for said court during his term of office, and all writs and process issuing from said court shall bear test in the name of said presiding judge and the seal of the court."

Governor Haskell, on September 12, 1908, appointed Henry M. Furman, of Ada, H. G. Baker, of Muskogee, and Thos. H. Doyle, of Perry, as the three members of said court. On September 16, 1908, they convened as a court, and Judge Furman was chosen by his colleagues to be the presiding judge.

Sec. 9 of said act provided:

"Sec. 9. The Supreme Court is hereby authorized to transfer to said Criminal Court of Appeals of the State of Oklahoma, any criminal cases now or hereafter pending in said court for determination by said court."

Under this provision the Supreme Court, immediately upon the organization of the Criminal Court of Appeals, transferred one hundred and seventeen criminal causes then pending before said court to this court.

The Second Legislature passed a law entitled: "An Act perpetuating the Criminal Court of Appeals, defining its duties, powers, and jurisdiction." Which act received the approval of the Governor on March 2, 1909, and took effect on June 10, 1909, being article 2 of chapter 14, Laws of 1909.

The following are among the provisions of said law:

"Section 3. In case of a vacancy in the office of a judge of said court, the Governor shall fill the vacancy by appointment for the unexpired term, or until the first succeeding biennial election. The judges of the Criminal Court of Appeals who may be in office at the time when this law takes effect, shall continue in office as judges of said Criminal Court of Appeals until the expiration of their term of office under their appointment, and until their successors are duly elected and qualified.

"Section 4. The state is hereby divided into three Criminal Court of Appeals Judicial Districts, designated respectively as the Eastern, Northern, and Southern Criminal Court of Appeals Judicial Districts. From each of said districts candidates for Judge of the Criminal Court of Appeals shall be nominated by political parties, or by petitioners of the respective districts, in the manner provided by law, and such nominees shall be voted for by the qualified voters of the state at large, and no elector at such election shall vote for more than one nominee from each district. The nominee from each district receiving the highest number of votes cast in the state at said election shall be declared the Judge-elect in said district. Of the Criminal Court of Appeals Judicial Districts, the Eastern District shall comprise the counties of Adair, Atoka, Bryan, Cherokee, Choctaw, Craig, Creek, Delaware, Haskell, Hughes, Latimer, LeFlore, Mayes, McCurtain, McIntosh, Muskogee, Nowata, Okfuskee, Okmulgee, Ottawa, Pittsburg, Pushmataha, Rogers, Sequoyah, Tulsa, Wagoner. The Northern District shall comprise the Counties of Alfalfa, Beaver, Blaine, Canadian, Cimarron, Dewey, Ellis, Garfield, Grant, Harper, Kay, Kingfisher, Lincoln, Logan, Major, Noble, Oklahoma, Osage, Pawnee, Payne, Texas, Washington, Woods, Woodward. The Southern District shall comprise the counties of Beckham, Caddo, Carter, Cleveland, Custer, Coal, Comanche, Garvin, Grady, Greer, Jackson, Jefferson, Johnson, Kiowa, Love, McClain, Marshall, Murray, Pontotoc, Pottawatomie, Roger Mills, Seminole, Stephens, Tillman, Washita.

"Section 5. The first election of judges under this law shall be had at the general election in 1910. At the first session of said court, after the first election of judges thereof under this law, the terms of office of said judges shall be divided into three classes, and the judges thereof shall draw for the different classes. The judge drawing class number one shall hold his office for two years from the second Monday in January, 1911, and until the election and qualification of his successor; and the judge drawing class number two shall hold his office for four years from the second Monday in January, 1911, and until the election and qualification of his successor; and the judge drawing class number three shall hold his office for six years from the second Monday in January, 1911, and until the election and qualification of his successor; and thereafter each of the judges of said court shall hold his office for six years.

"Section 6. The Criminal Court of Appeals shall hold six terms each year, at the Capitol of the state.

"Section 7. The Criminal Court of Appeals shall have exclusive appellate jurisdiction in all criminal cases appealed from county and district courts in this state, and such other courts as may be established by law.

"Section 8. The appellate and original jurisdiction of the Criminal Court of Appeals shall be invoked in the manner prescribed by law.

"Section 9. The Criminal Court of Appeals shall have exclusive appellate jurisdiction co-extensive with the limits of the state in all criminal cases, in the manner and under such regulations as may be prescribed by law.

"Section 10. Said court and judges thereof shall have the power to issue writs of habeas corpus; and, under such regualtions as may be prescribed by law, issue such writs as may be necessary to exercise its jurisdiction; and may prescribe and promulgate such rules for the government of said court as it may deem necessary.

"Section 11. Said court shall have power, upon affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.

"Section 12. Said court shall organize at the first session following the second Monday in January next after each biennial election by designating the elected member having the shortest time to serve as Presiding Judge, who shall be Presiding Judge of the said court for the next two years; provided the existing organization of said court shall continue until the second Monday in January, 1911.

"Section 18. The decisions of the Crminal Court of Appeals shall be reported and published as is provided by law for the reporting and publishing of the decisions of the Supreme Court.

"Section 19. The decisions and opinions of said court shall be published in separate volumes from the Supreme Court reports, the volumes of the decisions of said court shall be styled 'Oklahoma Criminal Reports,' and shall contain all decisions rendered in criminal cases since statehood, including those rendered by the Supreme Court of the State of Oklahoma; said volumes shall be printed and disposed of as is now or may hereafter be provided by law for the printing and distribution of the reports of the Supreme Court."

By virtue of the foregoing provision, all of the opinions of the Supreme Court of the State of Oklahoma, rendered in criminal causes, are contained in this volume.

The revised rules prescribed by the Criminal Court of Appeals, as adopted at the July, 1909, term, are contained in this volume. A careful study of these rules is commended to all concerned.

The large number of causes pending and undetermined in the Supreme Court of Oklahoma Territory, and the United States Court of Appeals of the Indian Territory, when Oklahoma was admitted as a state, and which were left as a legacy to this court, and the difference between the criminal procedure of the Indian Territory and that of Oklahoma Territory required an extraordinary amount of judicial labor to be performed by the court during the period covered by this and the succeeding volume.

The changes in procedure incidental to the organization of the state out of two territories, and the delay in publishing new laws made mistakes and omissions on the part of the officials charged with the administration of the criminal law almost unavoidable. But these conditions have passed, and all such officials will find that by careful study and frequent consultation of the Oklahoma Criminal Reports, the mistakes and omissions which are so prolific of reversals may be easily avoided, and they will find these reports an authoritative and convenient aid to an efficient and creditable discharge of their responsible duties. The labors of the court will thereby be largely lessened, the congested condition of the docket will be relieved, and all criminal appeals will be determined without delay.

RULES FOR THE CRIMINAL COURT OF APPEALS

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1. TERMS.

The Criminal Court of Appeals will convene in regular session each year as follows:

January term, the first Tuesday after the second Monday in January.

March term, the first Tuesday in March.

May term, the first Tuesday in May.

July term, the first Tuesday in July.

September term, the first Tuesday in September.

November term, the first Tuesday in November.

Special sessions of the court may be held at any time upon the call of the Presiding Judge. At the opening of the term, court shall convene at two o'clock, p. m. The sessions thereafter shall convene at ten o'clock, a. m., and two o'clock, p. m.

2. PLEADINGS.

1. Counsel for plaintiff in error shall file, with the original petition in error and case-made, a copy of said petition in error and case-made for the use of counsel.

2. The clerk shall not permit any original record to be taken from the court room, or from the office of the clerk, without an order from the court.

3. Counsel for plaintiff in error shall number the pages of the petition in error and case-made before filing the same, and shall attach thereto a complete and correct index, indicating the pages of the record, showing the pleadings, names and testimony of the witnesses for the state, their cross-examination, and the names and testimony of witnesses for the defendant and their cross-examination.

4. Transcripts may be certified by the clerk of the district or county court substantially in the following form:

State of Oklahoma, County of ———, ss.

I, ———, clerk of the ——— court for said county, do hereby certify that the foregoing is a full, true, and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of the court, this ——— day of ———, 19—.

————, Clerk.

5. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned, judge of the district court (or county court) of ——— district (or county) for ——— county, Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the above entitled (here state the facts with reference to the appearance of the parties and suggestion of amendments), and I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the clerk of said court.

Witness my hand at ———, in ——— county, Oklahoma, this ——— day of ———,, 19—.

———,
District Judge (or County Judge.)

Attest: ———, Clerk.

3. DOCKET.

1. The clerk shall keep a docket and enter thereon each case in the order in which the petition is filed. The cases shall be numbered consecutively upon the docket, and this number shall be given to the cause.

2. The clerk shall set in the order in which they appear on the docket six cases each day, on the calendar for argument, commencing with the first day of the term.

3. The clerk shall keep a motion docket upon which shall be entered every motion as soon as filed.

4. BRIEFS.

1. In each cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief upon the Attorney General within forty days after filing his petition in error and shall at the same time file ten copies of said brief with the clerk of this court, and the Attorney General shall, unless otherwise directed by the court, have thirty days after service on him of plaintiff in error's brief in which to serve and file his answer briefs. The briefs are not required to be printed, but when so desired may be printed. Proof of service of briefs may be filed with the clerk of this court within ten days after service.

2. The brief of plaintiff in error shall contain—First: A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. Second: A specification of the errors relied upon, specifically and particularly setting out each error asserted and intended to be urged. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected, stating specifically the objections thereto. When the error alleged is to the instructions of the court the specifications shall set out the part referred to **totidem verbis**, whether it be instructions given or instructions refused. Abstracts shall be indexed and shall refer to the pages of the record. Third: A brief of the argument, exhibiting a clear statement of the point of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.

3. The court may at any time after a cause is submitted request counsel for either or both parties to file with the court within the time fixed by the court in its request additional authorities if any they have upon any proposition involved in the cause.

4. When no counsel appears, and no briefs are filed, the court will examine the pleadings, the instructions of the court and the

exceptions taken thereto, and the judgment and sentence and if no prejudicial error appears will affirm the judgment.

5. No argument or motion filed or made in this court shall contain language showing disrespect for or contempt of the trial court.

5. ORAL ARGUMENTS.

1. All cases shall be assigned for oral argument in the order in which they are filed and will be heard in the order assigned unless the court on proper motion and showing shall order otherwise. At least fifteen days prior to said assignment, the clerk of the court shall notify the attorneys of record of the day on which such case will be heard.

2. The plaintiff in error shall be entitled to open and conclude the argument of the case.

3. Two hours on each side will be allowed for the argument and no more without special leave of the court. The time thus allowed may be apportioned between the counsel on the same side, at their discretion, provided, always that a fair opening of the case shall be made by the party having the opening and closing argument.

6. MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court.

3. No motion to dismiss, except on special assignment by the court, shall be heard unless previous notice has been given to the adverse party, or to counsel or attorney of such party.

4. The party moving to dismiss shall serve notice of the motion with a copy of his brief of argument on the counsel for plaintiff in error of record in this court, at least three weeks before the time fixed for submitting the motion.

5. There may be united, with a motion to dismiss an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument

7. HEARING AND SUBMISSION.

1. All cases shall be assigned for hearing and submission in the order in which they stand on the docket (except as hereinafter provided). If the parties, or either of them, shall be ready when the case is called upon the assignment, the same will be heard, and the cause submitted. If neither party shall be ready to proceed in the argument the case shall go to the foot of the docket unless some good and satisfactory reason to the contrary shall be shown to the court. Any cause may be advanced by leave of the court on motion of either party. All motions to advance causes must contain a brief statement of the matter involved with the reasons for the application. No other cause shall be taken up out of the order on the assignment.

8. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinion of the court shall be filed with the clerk of this court for preservation; also three extra carbon copies thereof, one of which shall be transmitted by the clerk within two days from the time the opinion is handed down to the name and address of the attorney of record for plaintiff in error, whose name first appears of record. The clerk shall tax as costs in the case one dollar and fifty cents for said copy so transmitted as provided by section 23, article 2, chapter 14, Session Laws of 1909.

3. Any judge may file a dissenting opinion in any cause in which he is qualified to sit, and in the determination of which he participated; but before any such dissenting opinion is filed it shall be submitted in conference to the judges who concurred in the original opinion. No syllabus in the dissenting opinion shall be published.

9. REHEARINGS.

1. Application for a rehearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court signed by counsel and filed with the clerk within fifteen days from the date on which the opinion in the cause is filed. Such petition shall briefly state the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court, and the question, statute, or decision so overlooked must be distinctly and particularly set forth in the petition. If such application is granted, the cause shall be assigned for rehearing, and the clerk shall notify both parties or their counsel of the time when such will be had, and such time may be given for argument or brief as the court shall allow.

2. After the expiration of fifteen days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered, in accordance with the decision of this court, and no petition for rehearing shall stay such mandate unless the person applying for rehearing shall present such petition to and obtain from one of the judges who concurred in the opinion a stay of such mandate until said petition for rehearing shall be heard. The judge to whom such petition is presented shall examine the same, and if, in his opinion, a rehearing will probably be granted, he may make an order staying such mandate.

In any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications, except by leave of court first obtained.

10. COSTS.

1. In all cases the plaintiff in error on filing his petition shall enter into an undertaking with the clerk with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.

2. Plaintiff in error shall be liable to the clerk for all costs made in this court, but in case judgment for costs is rendered against the defendant in error, the plaintiff in error may have execution for his costs expended.

3. In the taxation of costs in this court, the clerk shall not tax any costs for expense of case-made, transcript or record unless the party claiming the same shall prior to the filing of the opinion in the cause file with the clerk a verified statement of such expense and showing that he has paid the same.

11. ATTORNEYS.

1. Any practicing attorney of any state or territory, or the District of Columbia, having professional business in this court, may on motion be recognized for the purpose of presenting such cause in which he appears as counsel.

2. Improper, insulting or contemptuous language or conduct of attorneys to or concerning each other in court, or to and concerning the court, or any member thereof, either in or out of court, will be considered and treated as a contempt of the court.

IN MEMORIAM

Fielding Lewis, late Assistant Attorney General, died at his home in McAlester, on the 12th day of November, 1908.

BE IT REMEMBERED, That on this 9th day of December, 1908, the same being the opening day of the December, 1908, term, the Criminal Court of Appeals convened at the court room in Guthrie.

Present: H. M. Furman, Presiding Judge; H. G. Baker and Thos. H. Doyle, Associate Judges; W. H. L. Campbell, Clerk, and W. T. Field, Marshal.

Public proclamation having been made of the opening of said court, said court was declared duly open for the transaction of such business as might come before it.

Thereupon it was announced by the Presiding Judge that the only business to come before the court on this the opening day of the term would be the memorial service to be held in memory of the late Fielding Lewis, Esq., formerly Assistant Attorney General of the State of Oklahoma.

Thereupon Mr. West, the Attorney General, offered the following resolutions, and made the following remarks.

RESOLVED, That the officials of the legal department of the State of Oklahoma and the officers of this court feel with deep sensibility the loss which the state and the legal profession have sustained in the death of Fielding Lewis.

RESOLVED, That we cherish the highest respect for the professional learning of the deceased; for the purity and uprightness of his official and professional life; and for the amiable and excellent qualities which belonged to him as a man.

RESOLVED, That Mr. West, the Attorney General of the State of Oklahoma, do move the court that these resolutions be entered upon the minutes of the proceedings of this court.

I beg to announce to the court, on behalf of the officials of the legal department of the state and the officials of this court, the recent death of Fielding Lewis, who officiated as the first clerk of the United States Court of Appeals of Indian Territory, of which this court is a successor, and who later became Assistant Attorney General for the State of Oklahoma, and respectfully ask permission to have inscribed on the records of this high tribunal this expression of their respect for his memory, and esteem for his character as a public official, a lawyer and a good citizen.

It would be vain for me to dwell upon personal traits and incidents, his distinguished professional ability, the exercise of his genius and his unsullied probity and worth. All these are known to those who have so often admired him as friends and associates better than I am able to delineate them.

I now move the court to have entered upon the records of this court the attached resolutions adopted by the officials of the legal department of the state and the officials of this court.

REMARKS BY EDWARD G. SPILMAN, ASSISTANT ATTORNEY GENERAL.

May it Please the Court: I had known our departed friend but a short time prior to his passing away, but in that brief space I had learned to love and trust him like a brother. His many estimable qualities endeared him alike to friends old and new. Personally, I felt peculiarly drawn to him. He was from my own state, and I may say a scion of my own people. I know the stock from which he sprang. It is a proud and a talented race, and we all know how well he sustained the heritage bequeathed to him from a long line of patriots and statesmen. He combined the ability of the best of them with a winning sweetness of character all his own.

Had he lived he would have been a great lawyer, but no measure of greatness would have obscured his sympathetic and amiable qualities of heart. Nature lavished on him her gifts of intellectuality and benignant humanity. These gifts he put to noble uses. It is pleasant to dwell on these phases of his character which were so prominent and easily understood of all men, and which entitled him to recognition in the universal brotherhood of man. His nature was too broad and serene to admit of anything else than a thorough understanding of his relations to life and the duties that devolve upon the highly gifted.

He met his responsibilities like a man, and not only left behind him a memory fragrant with good deeds, but the conviction in the minds of all that he could and did perform the sterner duties as occasion demanded of him. He was singularly brilliant and successful as a prosecutor, and equally able and dextrous on the defense, though were he sentient today I am sure he would derive more pleasure from one forensic triumph in which he succeeded in mitigating the rigor of the law than from many such contests in which he figured as the scourge of wrong doing. I recall his jocular manner when, as his associate as Assistant Attorney General, he would hand me some document with the request that I give it what he was pleased to call the "magic touch"—and these papers generally related to cases where some one's labor would be lightened, some one's anxiety allayed, or, perhaps it was needed to convey a message of hope and cheer to some poor human wreck. The touch was often given, but the real magic was the inspiration imparted by himself.

It was a privilege to have known Fielding Lewis, and to have enjoyed his friendship, and I feel that even though I was so favored for only a short time it was sufficiently long for the association to better and enrich my own life. When he died he left his best and truest monument in the hearts of his friends. Rome's great satirist uttered thoughts of enduring wisdom when he wrote in his immortal Epilogue the words:

> Exegi monumentum aere perennius,
> Regalique situ pyramidum altius;
> Quod non imber edax, non aquilo impotens
> Possit diruere, aut innumerabilis
> Annorum series et fuga temporum.

REMARKS BY JUDGE H. G. BAKER, OF THE CRIMINAL COURT OF APPEALS.

was not my good fortune to be well acquainted with Brother Fielding Lewis, whose untimely death we are today mourning, and in whose honor we are called together at this time to pay our last respects. A casual meeting with the deceased brother sufficed to impress me with the many attributes of his noble character, his fine ability as a lawyer, and sterling qualities as a man and citizen.

In the death of our brother we are again reminded that death is an inevitable and universal heritage of mankind. We live an uncertain span; we die; our coming is a deep mystery; our ending is an unsolved and profound problem. Man has always lived in the pleasant hope and expectation that the glories of his earthly existence is not the end of all, but a mere passing from a life of labor, trials, and tribulations to a life free from trouble, pain, and death, beyond the grave.

It is both meet and proper that the surviving friends shall speak and write in praise of the virtues of the departed, and to erect, in their commemoration, monuments of stone and bronze, pointing out the last resting place, and, by proper inscriptions thereon, proclaim to the world, not only the last resting place of the dead, but other carved inscriptions thereon pointing out to the passers-by whose body it is that lies beneath.

But there are monuments more enduring and more exquisite than the finest and rarest bronze and granite. Tablets of love and memory upon which we take reverend pleasure to record the virtues of our departed brother. These monuments are more beautiful than could be provided by the greatest sculptor—monuments that grateful and tender hearts erect to perpetuate the memory of those they love.

It is both reasonable and pleasant for man to believe that the end of our earthly existence is not the end of all, but that death is but the opening of the portals to a better and purer existence.

This sad and solemn occasion recalls to our minds the beautiful words of one of this country's greatest orators, who said: "Our brother has gone to the undiscovered country. Whether his journey thither was but one step across an imperceptible frontier, or whether an interminable ocean, black, unfluctuating, and voiceless, stretches between these earthly coasts and those invisible shores—we do not know. Whether on the morning after his death, he saw a more glorious sunrise with unimaginable splendor above a celestial horizon, or whether his unconscious ashes sleeps in cold obscurity and insensible oblivion—we do not know. Whether his passions, ambitions and affections still sway, attract, and impel; whether they yet remember us as we remember him—we do not know."

These are the unsolved problems of mortal life and human destiny which prompted the troubled patriarch to ask that momentous question for which the centuries have given no answer: If a man die, shall he live again?

The noble life Brother Lewis lived argues forcibly and strongly in favor of the belief of future imperishable existence. His exemplary life, his noble and manly traits of character certainly should receive its reward in life eternal, free from pain, anguish and trouble.

The world is much better by reason of Brother Lewis having lived. His virtues, gentle bearing, courteous and amiable example should be emulated by all.

Let us, therefore, believe that death is not the end of all, and that he whose death we mourn today has left this vale of tears and suffering to that undiscovered country, where "He calleth them that are His" and where "the cooling fountains are."

REMARKS BY JUDGE THOS. H. DOYLE, OF THE CRIMINAL COURT OF APPEALS.

Mr. President and Brethren of the Bench and Bar: The sentiments expressed in the resolutions presented, and addresses delivered, of sorrow and regret for the death, and respect and reverence for the memory, of our departed brother, Fielding Lewis, meet with a sincere response from my heart. He was my friend, and while I will not attempt to pronounce a panegyric, if I failed to give utterance to my feelings on this sad and solemn occasion, I should be derelict in my duty and recreant to the impulses of my heart. I speak to the resolutions not only because he was my friend, and brother lawyer, but also because, as Assistant Attorney General, he became an official of this court at the time of its organization.

I first met Fielding Lewis at Washington, D. C., about seven years ago. At that time he was Mayor of South McAlester, and was in Washington looking after matters of interest to his city and to the Indian Territory. I was there as a Single State Delegate, looking after the Statehood Bill.

In that beautiful Capital City he was at home. After leaving the home of his childhood it was there that he had lived during the early years of his manhood; and there he acquired an extensive acquaintance with the foremost men of our country and numbered among his personal friends some of the most distinguished citizens of the nation.

Interesting and entertaining were the reminiscences he related of national events that had come within his personal observation. Our acquaintance thus formed ripened into friendship. I found him to be a high minded, noble hearted gentleman, and held him in the highest esteem, as I now respect and revere his memory.

Brother Lewis was born in the Old Dominion State, and his ancestors were among the first families of Virginia and Maryland.

To the well born youth no incentive to virtue, honor and high achievements could be stronger than to feel that in his own veins flows the blood of illustrious men, who from their tombs implore him by all the sacred memories of the past not to be unworthy of the name and fame of his progenitors.

Elizabeth Washington, the sister of that man to whom above all others in its history this nation is indebted, became the wife of Major Fielding Lewis of Fredericksburg, a Revolutionary officer of distinction. They were his great great grandparents. The record of his ancestry is indeed a noble one. Descent from the great and good is a high honor; and he that lives worthy of it is deserving of the highest esteem.

With this proud heritage of honor, and the physique and features of a Washington, of prepossessing presence, he was ever affable and unassuming, and depended alone on the force of his own merit and ability to make his way.

In the relations of life, as a son, husband, father, neighbor and friend, he was all that he should have been; as a private citizen and as a public official his conduct was exemplary. In his person and character, he was the incarnation of every trait and attribute that has made the name "American" a glory to our people. What higher renown can be earned and accorded to the dead than this?

Truly a good man has gone. The state has lost a most worthy citizen. In the maturity of his manhood he was called. Ever unwelcome, that grim monster death never came more unexpectedly or with more solemn impressiveness, to remind us of the frailty and uncertainty of all human existence, and the relentless purpose with which he at times wields his dread power. In the noon tide of life, in the midst of his labors, with prospects as bright as hope and ambition could picture, he was stricken. Death did indeed strike a shining mark.

Gentlemen of the Bar, you have lost one of your brightest ornaments. He may not have been blessed with that gift called genius, but he was endowed with a master mind. As a lawyer his erudition and industry placed him among the foremost. Faithful and fair to bench and bar; with the courage of his convictions, he was ever conscientious and courteous in the discharge of his professional duties. We will often miss the pleasure of his presence. Let us hope that his name is now enrolled among the inheritors of heaven.

Leaving his native state, he located at South McAlester, and thereafter his life and fortunes were identified with those of the people of what is now Oklahoma. Ever active and public spirited, his impressive personality has been potent in promoting the welfare of our people. We appreciate the services he has rendered, and when history records the name and fame of the pioneers, those who laid broad and deep the imperishable foundation of this sovereign state, his name will occupy no mean place among them.

As a Christian he was a devout Catholic. His life exemplified faith and charity, "Help for the living, Hope for the dead." And like him:

> "Who marks, from day to day,
> In generous acts his radiant way,
> Trod the same path the Saviour trod,
> The path to glory, and to God."

He was the original organizer in this state, of that great fraternal insurance organization, the "Knights of Columbus," and held high place in its councils.

Of his immediate family he is survived by his mother and a daughter. They have our heartfelt sympathy in their sorrowful bereavement. "Blessed are the pure in heart for they shall see God" was said on the mountain ages ago. We can only console ourselves by the reflection that one whose life has been one of probity and Christian charity, as we know the life of Fielding Lewis to have been, could only have gone to his eternal reward.

His mortal remains were borne from this, the land of his adoption, back to his native state. Borne thence, that his last resting place would be beside the beloved wife of his bosom, who had gone before. There beneath the shadow of the cross; there in the land of their love; there in old Virginia, where the sighing south wind and soughing pine forever sing a requiem for the "noble dead" within her bosom buried. May they rest in peace.

FURMAN, Presiding Judge, said: I became acquainted with Fielding Lewis in 1896 when he was Clerk of the United States Court of Appeals for Indian Territory. I was very much impressed with the simplicity and the elegance of his manners, and the uniform courtesy with which he treated all persons, who came in contact with him, as well as the prompt and efficient manner in which he transacted the business of his office. He was instinctively a gentleman, and a most capable officer. In 1897 Mr. Lewis entered the practice of law, and was from the first recognized as one of the strong lawyers of his section. His briefs were models of condensation and clearness. There was no room for speculation as to what his views were, and they were presented with great ability. He had the power of close analysis, and always went directly to the point at issue and presented only such authorities as were applicable to the questions under consideration. At the time of his death no lawyer in the state enjoyed a larger share of public confidence and esteem. His personal acquaintances were devoted to him. To know him was to love him. One of the strongest elements of his character was his fidelity to all trusts committed to his care. In fact it is believed that this loyalty cost him his life.

He had promised to try a case in a neighboring town. He was far from well; but, sacrificing himself, he kept his word and went through with the fatigues of a prolonged and closely contested trial, when he should have been in bed. This aggravated his disorder and he returned home to a sick room, which he did not leave alive.

"So the struck eagle,
Stretched upon the plain,
No more 'mid rolling clouds
To soar again.
Viewed his own feather
On the fatal dart
Which winged the shaft
That quivered in his heart;
While the same plumage
That had warmed his nest
Drank the last life-drop
From his quivering breast."

The State of Oklahoma in general, and the legal profession in particular, can ill afford to lose such men as Fielding Lewis.

It is ordered by the court that the resolutions submitted by the Attorney General be spread upon the minutes of this court, and that the State Reporter include these proceedings in the 1st Volume of the Oklahoma Criminal Reports. And as a further mark of respect the court will adjourn until tomorrow at the usual hour.

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Oklahoma Criminal Reports

Part I.

OPINIONS OF THE SUPREME COURT

ABBOTT V. TERRITORY.

No. 1785, Okla. T. Opinion Filed January 22, 1908.

(94 Pac. 179.)

INSTRUCTIONS—Reasonable Doubt. An instruction which states "by the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for"—was erroneous, and is cause for reversal of the judgment.

Error from District Court, Kiowa County; before F. E. Gillette, Judge.

T. A. Abbott was convicted of shooting with intent to kill and brings error. Reversed and remanded.

Plaintiff in error was indicted, tried, and convicted of the crime of shooting with intent to kill, and sentenced to serve a term of 18 months in the territorial prison. From this judgment he appeals.

At the conclusion of the evidence the court gave the following instruction on reasonable doubt:

"By the term 'reasonable doubt,' as used generally in these instructions, is meant a doubt that has a reason for it; it is a doubt you can give a reason for. It is that state ot the case which, after a full consideration of all the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubt, or entertain doubt from mere caprice or conjecture. Such doubt should arise only from an impartial and candid consideration of all the testimony and all the facts and circumstances presented upon the trial. If doubt does so arise, and by reason of it you cannot say that you are satisfied to a moral certainty of the guilt of the defendant, you should return your verdict herein of not guilty."

To this instruction the defendant at the time duly excepted, and now assigns error thereon.

Doyle & Cress and *Keys, Rummons & Cline,* for plaintiff in error.

Chas. West, Atty. Gen., and *G. A. Henshaw, Asst. Atty. Gen.,* for the Territory.

Williams, C. J. (after stating the facts as above). Elementary writers, in discussing the measure of proof necessary to require a conviction in a criminal case, have often stated that, "in cases of doubt, it is safer to acquit than to convict or condemn." Best on Evidence, §§ 49, 95, and 440. "In some cases presumptive evidences go far to prove guilty though there may be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons escape unpunished than one innocent person should die." Hale's Pleas of the Crown, vol 2, p. 289. Mr. Best in his excellent work on Evidence (section 95), in speaking of these statements which have become under the common law crystallized into maxims, says, they "are often perverted to justify acquittal." He further states that such other maxims as, "It is to the interest of the commonwealth that malefactors do not go unpunished," and "he threatens the innocent who spare the guilty," are not to be lost sight of. The foregoing maxims declare safe and humane rules for the guidance of both courts and juries. For him, however, who executes the laws, the moving course should be: Neither shall an innocent person be punished nor shall a guilty one go free.

Whilst this should be the purpose of the administrator of the law, yet quite a different rule is laid down for triors of facts, the jury. "The presumption of innocence is not a mere phrase without meaning, it is in the nature of evidence for the defendant; it is as irresistible as the heavens until overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence." Neither the law nor the exigencies of human government require the punishment of the doubtfully guilty. Doubts are to be resolved in favor of the prisoner. There should be no conviction until guilt is proved by competent evidence to the exclusion of all reasonable doubt. This is the mandate of the law, and the birthright of every English and American citizen. But in criminal trials it is not every species of doubt that would justify an acquittal. Such a doubt as to be a basis for an acquittal must be actual and substantial, not mere speculation or possibility. It must be a reasonable doubt; "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jury in that condition that they cannot say they have an abiding conviction, to a moral certainty, of the charge." There are degrees of doubt; moral certainty, excluding all reasonable doubt, is the required measure of proof in criminal cases.

It is contended by the plaintiff in error that this instruction, in effect, directs the jury to find the defendant guilty of the crime charged, unless they entertain a reasonable doubt arising out of the evidence, for which the jury are able to give some reason. We are of the opinion, after careful consideration, that this contention is well taken. After considerable research among the authorities, it seems that this instruction, or one given in substantially the same language, has been uniformly disapproved by the courts. The vice of this instruction is in the use of the language "by the term 'reasonable doubt' * * * is meant a doubt that has a reason for it; it is a doubt you can give a reason for."

In *Cowan v. State,* 22 Neb. 519, 35 N. W. 405, the Supreme Court of Nebraska, speaking by Chief Justice Maxwell, in passing upon this question, has held that an instruction which contained the following words: "It is a doubt for having which the jury can give a reason based upon the testimony," was calculated to mislead, and no doubt did mislead, the jury. And in *Childs v. State,* 34 Neb. 236, 51 N. W. 837, the same court decided that in a prosecution for grand larceny, where the court instructed the jury: "On the question of reasonable doubt the court instructs the jury that the term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it arising out of the evidence in the case; such a doubt as you are able to find a reason in the evidence for," etc.—such instruction was erroneous, and cause for reversal of the judgment. This instruction is practically in the identical language of the instruction we now have under consideration. It appears that the instruction that was given by the court was taken substantially from Sackett in his Instructions to Juries (2d Ed.)p. 646, and, from an examination of the authorities cited by the author, we are clearly of the opinion that they do not support the text.

In Greenleaf on Evidence (8th Ed.) vol. 3, § 29, the learned author says:

> "A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully, and find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal persumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law, that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt."

The other authority cited by Sackett is the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, which is the celebrated Webster case in which Chief Justice Shaw, in defining the degree of proof, uses the following language:

> "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of in-

nocence and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty —a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

This instruction by Chief Justice Shaw has been approved by the Supreme Court of Oklahoma Territory in the case of *Patswald v. United States*, 7 Okla. 232, 54 Pac. 458, and by all the leading courts of the country.

This same question has been before the Supreme Court of Iowa. An instruction in almost the identical language was disapproved in the case of *State v. Cohen*, 108 Iowa, 208, 78 N. W. 857, 75 Am. St. Rep. 213, where it was held that: "An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as in effect, placing the burden on defendant to furnish reasons for acquittal." And where it was also further held that: "An instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as requiring jurors to give reasons for their conclusions." And in this case the court, speaking by Mr. Justice Ladd, uses the following language:

"Nor can we approve the fifth instruction as a safe definition of 'reasonable doubt.' 'By a "reasonable doubt"as herein instructed is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.' The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of finding reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached."

In *Siberry v. State,* 133 Ind. 677, 33 N. E. 681, the Supreme Court of Indiana held that: "It is erroneous to instruct the jury that a 'reasonable doubt is such a doubt as the jury are able to give a reason for.' " In *State v. Sauer,* 38 Minn. 439 38 N. W 355, Mr. Justice Mitchell, who delivered the opinion of the court, says: "The most serious objection to it is that it is liable to be understood as meaning a doubt for which a person could express a reason in words. A person may, after a consideration and comparison of all the evidence, feel a reasonable doubt as to the guilt of a defendant, and yet find it difficult to state the reason for the doubt." In *Owens v. United States,* 130 Fed. 279, 64 C. C. A. 525, an instruction in the following language: "A reasonable ground of doubt is one which is reasonable from the evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence"—was disapproved.

We are of the opinion that the instruction given in this case was erroneous, and it therefore requires a reversal of this case.

Other errors arising during the course of the trial are assigned and argued, but as the cause must be reversed and remanded, with directions to grant a new trial, it is unnecessary to review them.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

All the Justices concur.

Ex parte CAIN.

No. 39. Opinion Filed February 3, 1908.

(93 Pac. 974.)

1. **WORDS AND PHRASES—"Imprisonment."** The word "imprisonment," in its ordinary sense, contemplates and means within the common jail, rather than in the penitentiary.
2. **INTOXICATING LIQUORS—Violation of Prohibitory Article of Constitution—Misdemeanor.** The offense of manufacturing, selling, bartering, giving away, or otherwise furnishing any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of the prohibition article of the Constitution, is a misdemeanor.
3. **SAME—Punishment.** The maximum punishment for said offense is by imprisonment in the county jail not exceeding one year, and by fine not exceeding $500.
4. **SAME—Prohibition Article Self-Executing.** The prohibition provision in the Constitution prohibiting the manufacture, sale, barter, or giving away of any intoxicating liquors, including ale, beer, and wine, contrary to said provisions is valid and self-executing.

(Syllabus by the Court.)

Petition of Jim Cain for writ of *habeas corpus*. Writ denied.

F. E. Riddle, for petitioner.

W. C. Reeves, Asst. Atty. Gen., and *J. D. Carmichael, Asst. Co. Atty.,* for respondent.

WILLIAMS, C. J. The petitoner in this case was tried in the county court of Grady county, sitting as such and exercising the jurisdiction of a county court of the state of Oklahoma, on the 11th day of January, 1908, and adjudged guilty of the crime of selling intoxicating liquor, and is now confined in the jail of said county in the custody of M. B. Louthan, sheriff of said county, under a commitment duly issued out of said county by virtue of said adjudication. The information made against said petitioner, and on which he was convicted, is in due form and charges that the said petitioner "at and within said county and state on the 23d day of November, 1907, then and there being, did, then and there wilfully and unlawfully sell to one Emmett Ades intoxicating liquors, to- wit, one-half pint of whisky, for a price unknown to the affiant, contrary to the form of the statute," etc. This cause is now properly before this court on writ of *habeas corpus;* the petitioner contending that said county court was without jurisdiction to try said cause or to sentence said petitioner under said conviction, and for the reason of said want of jurisdiction that he is now unlawfully restrained of his liberty by said sheriff.

"Any person, individual or corporation who shall manufacture, sell, barter, give away or otherwise furnish intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section * * * shall be punished on conviction thereof, by a fine not less than fifty dollars and by imprisonment not less than thirty days for each offense. * * * Upon the admission of this state into the Union, these provisions shall be immediately enforceable in the courts of the state. * * *" (Prohibition article of the Constitution.)

Counsel for petitioner earnestly contends that the offense charged is a felony, and that, the county court having no jurisdiction of felonies, the judgment rendered in said court adjudging said defendant guilty of said charge is absolutely void.

The retail liquor traffic is a mere privilege, and, in defining the extent to which the privilege goes, the law should be strictly construed against the traffic. *Schmidt v. State,* 14 Mo. 137. That the state in the exercise of its police powers has the right to prohibit the manufacture and sale of intoxicating liquors is no longer an open question. *Bartemeyer v. Iowa,* 85 U. S. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts,* 97 U. S. 33,24 L. Ed. 992 *Foster v. Kansas,* 112 U. S. 205, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Muller v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

But is said provision self-executing? If not, the statutes of Oklahoma Territory relative to the licensing of the liquor traffic are still in force, and will so remain until statutory provisions are enacted to make said prohibition provision effective. *C. & F. R. Co. v. Trout,* 32 Ark. 17; *Lamb v. Lane,* 4 Ohio St. 167; *Doddridge v. Stout,* 9 W. Va., 703; *Chahoon v. Commonwealth,* 20 Grat. (Va.) 733. The doctrine is well settled that, as a rule, negative or prohibitory clauses in a Constitution are self-executing. *Law v. People,* 87 Ill. 385; *Oakland Paving Co. v. Hilton,* 69 Cal. 479, 11 Pac. 3; *De Turk v. Commonwealth,* 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. Rep. 705; *State v. Woodward,* 89 Ind. 110, 46 Am. Rep. 160. If it supplies the rule for enforcement and fixes the penalty for violation, there can be no doubt as to its character, but a provision may sometimes be both prohibitive and mandatory, and not self-executing; hence in such cases it always becomes a question of intention, and to determine the intent the rule is courts will consider the language used, the object to be accomplished by the provision, and the surrounding circumstances, and to determine these questions from which the intention is to be gathered courts will utilize extrinsic matters when it becomes necessary. Even though there may be no penalty attached for violations of constitutional provisions, it does not necessarily imply that the provision is not self-executing. The want of a penalty, however, is a circumstance which should be given great weight in determining as to whether or not the same is self-executing. The proper rule is that prohibitive and restrictive provisions are self-executing when they may be enforced by the courts independent of statutory enactments.

The next thing to determine is whether or not a penalty has been prescribed for such violation. Was it the intention that the words "shall be punished on conviction thereof by fine of not less than fifty dollars and by imprisonment of not less than thirty days for each offense," should be a limitation upon the action of the Legislature, or prescribe a penalty that was immediately enforceable in the courts? The same provision states: "Upon the admission of this state into the Union this provision shall be immediately enforceable in the courts of the state." The rules of construction should be so applied to written Constitutions as to give effect, if possible, to the intent of the framers and of the people who have adopted it, and to promote the objects for which the same was framed and adopted. But it may be contended, if we adopt the literal words of this provision, that, whilst it is stated that the same shall be immediately enforceable, yet we find no minimum punishment provided, and that consequently the same is not a complete criminal statute without such definite provision, and that, therefore, it is not enforceable without additional legislation to give it effect. A statute providing a minimum, without fixing the maximum, punishment, is neither invalid as being in violation of section 9, art. 2, of our Constitution, nor as being too vague and indefinite to be enforced, at least as to the minimum punishment which is valid without additional enactments. *State v. Fackler,* 91 Wis. 419, 64 N. W. 1029; *State v. Williams,* 77 Mo. 310. Hence it is not necessary, in considering as to whether or not said provision is self-executing, to determine as to whether or not punishment in excess of 30 days' imprisonment and $50 fine under said prohibition provision incorporated in our Constitution, without further legislation, could be imposed; for, having determined that said prohibitory provision prescribed an enforceable minimum punishment, we necessarily conclude that said provision, as it appears in said Constitution, is self-executing.

Section 13 of the enabling act provides as follows:

"That said state, when admitted as aforesaid, shall constitute * * *; and that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof."

Also section 2 of the schedule of the Constitution reads as follows:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Constitution and which are not locally inapplicable shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

Section 1935, Wilson's Rev. & Ann. St. Okla. T. 1903, being section 14, art. 1, c. 25, is as follows:

"Except in cases where a different punishment is prescribed by this code or by some existing provisions of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year and by a fine not exceeding five hundred dollars or both such fine and imprisonment. * * *"

The question now arises as to whether or not said section

1935 is in conflict with the prohibition provision of the Constitution heretofore referred to. In said section 1935 it is stated that, except in cases where definite punishment is prescribed by the Code or by some existing provision of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding $500, or by both such fine and imprisonment. Said section is in conflict or inapplicable to the penalty in said prohibition provision only in one respect; and that is where it provides that said misdemeanor may be punished by imprisonment not to exceed one year in the county jail or by a fine not exceeding $200, but that otherwise it is applicable; and hence we reach the conclusion that the maximum punishment for the offense of which the relator stands convicted is punishable by not exceeding one year's imprisonment and also a fine not exceeding $500, provided the charge is a misdemeanor.

A felony at common law is an offense which occasions a total forfeiture of either lands or goods or both and to which capital or other punishment *may* be superadded according to the degree of guilt. 1 Russell on Crimes, c. 4, p. 77.

"By the early common law in England *felonies* were those crimes punishable capitally, or by forfeiture of land, or goods, or both, but the term was not one of settled meaning, and by some authorities the test was the liability to forfeiture rather than the liability to capital punishment. * * * In statutes creating or defining offenses, the language usually expressly indicates whether the offense is to be deemed a felony or misdemeanor, and for practical purposes it may be said that those crimes which, by the common law, were punishable capitally, or which are expressly made felonies by statute, are now to be considered of that class, while all other criminal offenses are to be deemed misdemeanors, and no offense is to be deemed a felony unless it comes within this description. But, if the offense has been a felony the mere reduction of the punishment will not of itself change it to a misdemeanor." (1 McClain on Criminal Law, sec. 18.)

"An offense shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under 'a pain of forfeiting all that a man has,' or of 'forfeiting body and goods,' it shall amount to no more than a high misdemeanor. * * * The word 'misdemeanor.' in its usual acceptation, is applied to all those crimes and offenses for which the law has not provided a particular name; and they may be punished according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offenses which do not amount to felony." (I Russell on Crimes [9th Ed.] C. 4, p. 78.)

The selling of intoxicating liquors at common law was not a felony, not even a crime. So, when it is made a crime, and the statute does not expressly state as to whether it is a felony or misdemeanor, the presumption is that it is a misdemeanor. *State v. Hill,* 91 N. C. 561; *U. S. v. Belvin* (C. C.) 46 Fed. 385. Constitutions being instruments in the nature of re-enactments of approved systems and principles coeval with, and a part of, the common law, itself a subject of judicial interpretation, though there is exception, it necessarily follows that the definitions of the terms used in Constitutions are, to a great extent, to be found in the common law. *People v. Lynch,* 51 Cal. 15, 21 Am. Rep. 677; *State v. Noble,* 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; *Durham v. State,* 117 Ind. 477, 19 N. E. 327; *People v. Hurlbut,* 24 Mich. 44, 9 Am. Rep. 103; *People v. Draper,* 15 N. Y. 532; Cooley on Constitutional Limitations (6th Ed.) 75; 10 Century Digest, tit. "Constitutional Law," sec. 13; *Fox v. McDonald,* 101 Ala. 51, 13 South. 416, 21 L. R. A. 429, 46 Am. St. Rep. 98; *English v. State,* 31 Fla. 340, 12 South. 689; *Flavell's Case,* 8 Watts & S. (Pa.) 197; *English v. State,* 31 Fla. 340, 12 South. 689; *State v. Barker,* 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; 8 Cyc., p. 740-1.

Section 1931 of Wilson's Revised and Annotated Statutes of Oklahoma Territory of 1903 is as follows:

"The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All of its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice."

This section has no application to the interpretation or construction of the Constitution, for the Legislature has the power to repeal or amend this section. And, whilst it is a fact that the Legislature has the power to repeal or amend certain sections in the Constitution, yet they are specifically designated therein, and if the relator's contention that said section 1931 applies to the interpretation of the Constitution, the Legislature would have it within its power to hereafter change the Constitution by providing as to the interpretation or construction of the same. Such a proposition is without merit.

Hence we come to the proposition as to the meaning of "imprisonment" in the section under consideration; that is, whether it means imprisonment within a jail, or state prison or penitentiary. The word "imprisonment" means imprisonment in the county jail or local prison unless expressed to be in the penitentiary. *Cheaney v. State,* 36 Ark. 75; *State v. McNeill,* 75 N. C. 15; Hockheimer on Crimes and Criminal Procedure, § § 112, 345. There is a distinction in law between the gaol, or jail, and penitentiary. Black's Law Dictionary; Anderson's Law Dictionary; Bouvier's Law Dictionary. Under the statute imposing as to certain offenses a punishment by imprisonment not more than one year, which is silent as to the place of imprisonment, a sentence inflicting punishment by imprisonment in the penitentiary for one year, is error and must be reversed. *Horner v. State,* 1 Or. 268. A person convicted of conspiracy to defraud under a section of the Colorado Code which did not prescribe the place of imprisonment was illegally sentenced and sent to penitentiary in place of the county jail, holding that, where two statutes are susceptible of the same construction, that is to be preferred which is most favorable to defendant. *Brooks v. People,* 14 Colo. 413, 24 Pac. 553.

Section 18 of article 7 of the Constitution limits the jurisdiction of justices of the peace to misdemeanors in which the punishment may not exceed a fine of $200 or imprisonment in the county jail not exceeding 30 days, or both such fine and imprisonment. Section 12, article 7, also provides that the county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and exclusive jurisdiction in all misdemeanor cases in which the justices of the peace have no jurisdiction. The relator having been convicted of a misdemeanor for which the maximum punishment is more than 30 days in jail or a fine of $200 or both the county court has exclusive jurisdiction in his case.

For these reasons we overrule relator's demurrer to the sheriff's return herein and remand the relator to the custody of the sheriff of Grady county, with directions that he be recommitted to the jail of said county, pursuant to the judgment of said county court.

Writ of *habeas corpus* denied.

All the Justices concur.

In re THOMAS *et al.*

No. 43. Opinion Filed Feb. 4, 1908.

(93 Pac. 980.)

1. **BAIL—Application for—Burden of Proof on Applicant.** Upon an application to the Supreme Court for bail, by writ of habeas corpus, after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty.
2. **SAME—Reasonable Doubt.** If, after hearing the whole evidence, introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused.
3. **SAME—Conflict in Evidence—Force to be Given.** It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of "evident proof" made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated the proof is evident and bail should be denied.

(Syllabus by the Court.)

Original Proceeding in Habeas Corpus.

Application of John F. Thomas and Will Thomas for writ of *habeas corpus.* Bail refused.

T. J. McMurray, Al J. Jennings, and *John H. Burford,* foi petitioners.

Charles West, Atty. Gen.; W. C. Reeves, Asst. Atty. Gen.; S. M. Cunningham, Fain & Young, and *W. Poindexter,* for the State.

KANE, J. This cause is here on a petition for a writ of *habeas corpus* by John F. Thomas and Will Thomas, in which they contend they are unlawfully imprisoned and restrained at Lawton in the common jail of Comanche county, state of Oklahoma, by Rufe Le Fors, sheriff of said county, and one Julian, jailor of said Comanche county jail; that the cause of restraint, according to their best knowledge and belief, is that they have been committed to said Comanche county jail for the crime of murder, without bail, by a justice of the peace sitting as an examining magistrate. Said petitioners further allege that they are innocent of the crime of murder and that the proof, as shown by the record of this cause in the examining trial under which they were committed, shows that the proof against them is not evident nor the presumption thereof great. On this petition a writ of *habeas corpus* was issued For his return to the writ Rufe Le Fors, sheriff of Comanche county, state of Oklahoma, shows to the court that he holds the petitioners in his custody and restrains them of their liberty by virtue of a writ of commitment issued by S. Armstrong, justice of the peace in and for the city of Lawton, Comanche county, state of Oklahoma, to him issued and delivered on the 22d day of January, 1908, upon hearing before said S. Armstrong, justice of the peace, in a preliminary trial in said court, charging the petitioners with the crime of murder; that the petitioners were committed to the common jail of Comanche county, Okla., and are being held by him as the duly qualified and acting sheriff of Comanche county, under and by virtue of said commitment; and that he now produces said petitioners in person in this court in obedience to said writ of *habeas corpus.*

Upon agreement of counsel the case was heard in this court upon the record and testimony introduced at the preliminary examination before Hon. S. Armstrong, justice of the peace within and for the city of Lawton, Comanche county, Okla. The question, then, before the court is: Are the petitioners entitled to bail upon the showing made at the preliminary examination before the committing magistrate, under section 17, art. 2, of the Bill of Rights of the state of Oklahoma? which reads:

"All persons shall be liable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great."

The first appearance of the above terms in American statutory or constitutional law seems to have been in a part of article 2 of an Ordinance for the Government of the Territories of the United States north of the River Ohio, which reads as follows:

"The inhabitants of the said territory shall always be entitled to the benefit of the writ of *habeas corpus,* and of the trial by jury, of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." (1 Stat. 52.)

From this original this language has been copied into most of the state Constitutions and statutes. With the exception that some Constitutions contain only provisions as "excessive bail," and that others use the words "before conviction," or words of like import, or the words "murder" and "treason," instead of the words "capital offenses," and other slight changes, the language used above is substantially that of all the Constitutions

The only use of the term, "when the proof is evident or the presumption great," independent of statute or Constitution, we have been able to find in the Reports is in *Territory v. Benoit,* 1 Mart. (O. S.) 141, by the Supreme Court of Louisiana The indictment was for a capital offense, and the motion was to have the defendant bailed. The court said:

"It cannot be done. Bail is never allowed in offenses punishable by death, when the proof is evident or the presumption great."

In *High v. United States,* reported in Morris (Iowa) 407, 43 Am. Dec. 111, Mr. Chief Justice Mason, speaking of this provision as it appears in the Ordinance of 1787, says:

"The Ordinance of 1787, the benefits of which have been transmitted to us, declares that 'all persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great.' This is no new provision, but is in express terms incorporated in the Constitutions of at least one-half of the states of the Union, and is the rule of action in all the rest. It is merely declaratory of the common law of the United States."

By the common law all offenses, including treason, murder, and other felonies, were bailable before indictment found. Certain restrictions were, however, enforced upon justices of the peace concerning their right to let to bail; but in the Court of King's Bench bail was not a matter of right in capital felonies, being limited by judicial discretion exercised according to the degree of proof of guilt. *Rex. v. Marks,* 3 East, 157; *Ex parte Baronett,* 16 Eng. L. & Eq. 361; 2 Hale, P. C. 129. These principles of the common law are materially modified, in all except capital offenses, by our constitutional provision quoted above, and now, instead of all cases being bailable in the discretion of the court and not as a matter of right, under section 17 of the Bill of Rights all persons shall be bailable by sufficient sureties, as a matter of right, except for capital offenses when the proof of guilt is evident or the presumption thereof is great.

> "If the offense is not shown by evident proof or great presumption to be one for the commission of which the law inflicts capital punishment, bail is not a matter of mere discretion with the court, but of right to the prisoner." (*Ex parte Bryant,* 34 Ala. 270.)

The policy pervading our jurisprudence is to commit as little as possible to judicial discretion, presuming that "that system of laws is best which confides as little as possible to the discretion of the judge—that judge is best who relies as little as possible upon his own opinion." In pursuance of this policy, ever since the provisions "that all persons shall be bailable by sufficient sureties except for capital offenses, where the proof of guilt is evident or the presumption thereof is great," became a part of the settled constitutional and statutory law of nearly all the states of the Union, the courts have endeavored, with more or less success, to formulate some stable rule to guide their judgment in cases like the one at bar.

Thus it was said by the court of common pleas of Philadelphia county in an early case, construing exactly the same provision in the Pennsylvania Constitution:

> "It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by a jury on such evidence of guilt as was exhibited by him on the hearing of the application to admit to bail. (*Com. v. Keeper of Prison,* 2 Ashm. [Pa.] 227.)

This doctrine is approved in a *per curiam* opinion in the *Matter of Salvador Troia on Habeas Corpus,* 64 Cal. 152, 28 Pac. 231, where the court adopts the above excerpt from the Pennsylvania case as part of its syllabus.

Simrall, J., in *Street v. State,* 43 Miss. 1 cites the rule laid down in the same approvingly, saying:

> "There is much force in the words of the Pennsylvania court in the case of *Commonwealth v. Keeper of Prison,* 1 Ashm. (Pa.) 234."

Street v. State, supra, was in the Supreme Court on a writ of error issued to the district court of Yazoo county, and Justice Simrall stated as a reason for adopting the Pennsylvania rule that:

> "It would be going very far in the appellate court to reverse the judgment of the court who saw, heard, and observed the witnesses."

Ohio in *State v. Summons,* 19 Ohio, 139; Indiana, in *Lumm v. State,* 3 Ind. 239; California, in the *Matter of Salvador Troia on habeas corpus,* 64 Cal. 152, 28 Pac. 231; Texas, *In Re Foster,* 5 Tex. App. 625, 32 Am. Rep. 577, and possibly one or two other cases, refer to the Pennsylvania case approvingly.

But most of these cases were in the Supreme Courts on appeal, and in others of them the rule has since been disapproved by the highest courts of the same states.

Another line of decisions hold that the terms "when the proof of guilt is evident, or the presumption thereof is great," are as definite to the legal mind as any words of explanation could make them. In the states where this rule prevails the courts, when they refuse bail, do so with the statement "that bail should be refused where the proof of guilt is evident or the presumption thereof is great;" and when bail is granted, by the statement, "that where the proof of guilt is not evident, nor the presumption thereof great, bail should be allowed in capital cases." Thus in California, in *Ex parte Walpole,* 85 Cal. 362, 24 Pac. 657, Fox, J., without commenting on the rule laid down in the *Matter of Salvador Troia, supra,* says:

> "On the question of admission to bail, the offense charged is punishable with death, unless the jury fix it at imprisonment for life. The defendant, therefore, cannot be admitted to bail if the proof of his guilt is evident or the presumption thereof great."

Colorado, Kansas, Kentucky, and Texas in several cases have followed this rule.

This court does not look with favor on either of the above rules. The first one seems to us to be unmindful of the inherent right of life, liberty, and the pursuit of happiness of the citizen, and casts burdens upon those charged with capital offenses not contemplated by the law. The second is too general to be useful as a guide to the judgment of the court in weighing the evidence when the liberty of the citizen is in the balance. Primarily a person charged with a capital offense cannot demand bail as a matter of right, since, upon ascertaining the character of the charge against the accused, the next question would be as to the degree of proof and the nature of the presumption of guilt. Upon an application to the Supreme Court for bail, by writ of *habeas corpus,* after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty. *Ex parte Hammock,* 78 Ala. 414; *Ex parte Rhear,* 77 Ala. 92; *Ex parte Vaughan,* 44 Ala. 417. On this question there is ittle conflict in the authorities. Alabama, California, Florida, Indiana, Nevada, New Jersey, New York, Utah, and Wyoming all support the proposition. Texas seems to be the only state placing the burden of proof upon the state to snow that the offense is a capital one and that the proof is evident; but even there the doctrine of the text prevailed until it was upset in the case of *Ex parte Bud Newman,* 38 Tex. Cr. R. 164, 41 S. W. 628 70 Am. St. Rep. 740.

We believe that, with the burden of proof on the petitioners, if, after hearing the whole evidence introduced on the application, for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused. But we do not wish to be understood as laying this down as a hard and fast rule, to which there may be no exceptions. There may be exceptional circumstances, such as the serious and probably fatal injury to health, or unusual and protracted delay upon the part of the state in bringing the prisoner to trial, that may warrant the court hearing all the evidence to admit to bail, when the proof of guilt is evident or the presumption thereof is great. The admission to bail, however, under these circumstances is not a constitutional right, but a matter resting in the sound judicial discretion of the trial judge, who should not grant it save under extraordinary circumstances. The rule herein laid down is supported by an array of well-reasoned cases. Those we particularly rely on are *Ex parte McAnally,* 53 Ala. 495, 25 Am. Rep. 646, *Ex parte Bridewell,* 57 Miss. 39; *Ex parte Tom Smith, Jr.,* 23 Tex. App. 100, 5 S. W. 99.

In *Ex parte McAnally,* Brickwell, C. J., states the rule thus:

> "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right."

Ex parte Bridewell, Chalmers, J., states the rule as follows.

> "Upon an application for bail by writ of *habeas corpus,* the burden is upon the relator to show that he is illegally deprived of his liberty. * * * If, upon the whole testimony adduced, the court entertains a reasonable doubt whether the relator committed the act, or whether in so doing he was guilty of a capital crime, he should admit him to bail in such sum and with such sureties as will in his opinion certainly insure his appearance."

We wish here to quote with approval the language of Chalmers, J., in rejecting the Pennsylvania rule laid down in *Com. v. Keeper of Prison,* 2 Ashm. (Pa.) 227:

> "The error of the Pennsylvania rule is in failing to give due effect to a verdict of conviction, or in overlooking the vast change it effects in the attitude of the party. By it the legal presumption of innocence is overthrown, all doubtful questions of fact are resolved in favor of the state, and the credibility or noncredibility of witnesses is conclusively established. A verdict of conviction where no error of law has intervened will never be set aside unless manifestly wrong, or, as is sometimes said, if there be any evidence to support it. To say that bail will only be granted where there is no evidence showing guilt, or where the proof of guilt is

so slight upon the whole testimony that a conviction would be manifestly wrong, is plainly inconsistent with the constitutional requirement that it shall be granted in all cases except where the proof is evident or the presumption great."

Both of the foregoing cases were reviewed in *Ex parte Tom Smith, Jr., supra.* Mr. Justice Willson, speaking of the rule laid down in the *Case of McAnally, supra,* said:

"With regard to the second rule, it is not, as we can perceive, objectionable. It is, as we understand it, in harmony with the constitutional requirement that bail shall be granted unless the proof is evident. It is, in effect, the same rule stated as a correct one in the *Bridewell Case, supra,* but in different language."

We approve the Alabama rule, as stated in the *McAnally Case,* in the main; but we believe that the part reading, "and that he would probably be punished capitally if the law is administered," is a little more liberal in favor of the accused than a fair construction of the provision under discussion warrants. Under the statutes of Oklahoma the jury have the power in all cases of murder to determine whether the punishment shall be death or imprisonment for life; but this does not make the offense less capital. It would seem to us that a rule that would require the court to speculate as to what punishment a jury might probably inflict upon any given state of facts would be more harmful than helpful. Speaking of the rule of the Pennsylvania case, *supra,* Justice Willson, in *Ex parte Tom Smith, Jr.,* said:

"With respect to the first rule, we are convinced that it is wrong and should no longer be recognized as a guide. It is ably and justly criticised in the *Bridewell Case,* 57 Miss. 39."

And the doctrine of this case is not without support from the courts where the common-law rule prevails. The law is laid down to the same effect in 4 Bl. Com. 299; and in *Rex v. Marks,* 3 East. 165, the rule is advanced in these cautious and qualified terms:

"The court will bail whenever there is any doubt on the law or the facts in the case."

And again in New York, a state following the common-law rule, we find the following in relation to a case similar to the one at bar:

"If there be no reasonable doubt of the prisoner's guilt, he ought not to be bailed." (*Ex parte Taylor,* 5 Cow. 39.)

The same doctrine is sanctioned in *State v. McNab,* 20 N. H. 160, and *State v. Rockafellow,* 6 N. J. Law, 335. The rule is practically the same in the federal courts:

> "On testimony given in court on the return of a writ of *habeas corpus,* if it is clear to the mind of the judge that a conviction for murder should not take place, he will order the prisoner to give bail for his appearance." (*U. S. v. Marshal of Dis. of Col.,* Fed. Cas. No. 15,725a.)

The point is made that, as there is a conflict in the testimony adduced at the hearing, the proof of guilt cannot be said to be evident or the presumption thereof great. This contention cannot be sustained.

> "To the mind of the tribunal passing upon the evidence the guilt of the applicant of a capital offense may be evident—that is, clear, strong, not admitting of a reasonable doubt—and yet there may be evidence in conflict with such inculpatory evidence. It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt and destroy or impair the force of 'evident proof' made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated the proof is evident and bail should be denied." (*Ex parte Tom Smith, Jr.,* 23 Tex. App. 127, 5 S. W. 102.)

We will not comment upon the evidence, lest our comments should influence the final trial. To decline to do so seems to be the uniform practice, as it has always obtained in such cases. We will only say that, applying the rules herein enunciated to the facts as shown by all the evidence before us, we are of the opinion that the proof of guilt is evident and the presumption thereof is great. We do not wish to be understood as saying that the petitioners are guilty of murder, or that their innocence of the offense charged or of a lower degree of homicide may not be made to appear most fully upon their final trial. We are only passing upon the sufficiency of the evidence exhibited in this record, and upon it alone is our opinion predicated.

It follows that bail must be refused.

Dunn and Turner, JJ., concur; Hayes, J., concurs in the reasoning and the rules enunciated, but dissents from the conclusion refusing bail to petitioner John F. Thomas; Williams, C. J., dissents from some of the reasoning and some of the rules enunciated, but concurs in the conclusion refusing bail.

McGINLEY v. TERRITORY.

No. 1908, Okla. T. Opinion Filed Feb. 18, 1908.

(94 Pac. 525.)

GRAND JURY—Drawing—Fatal Irregularity. A jury box was prepared under an order of the court by leaving therein that portion of the names which had been taken by the county clerk from the jury lists of 10 precincts of the county from which jury lists had been properly returned by the judges of election that had not hitherto been withdrawn in the formation of juries, and by placing in said jury box names of persons from the other 17 precincts of the county from which returns of jury lists were not made by the judges of election in accordance with the law, which said names from said 17 precincts were equal in number to the full quota and proportion to which said precincts were respectively entitled, and were furnished by the board of county commissioners. **Held** that, under the rule announced in **Sharp v. United States,** 138 Fed. 878, 71 C. C. A. 258, said jury box was not prepared in accordance with section 6 of chapter 46 (section 3313) of Wilson's Rev. & Ann. St. 1903 of Oklahoma, and that a grand jury drawn from said jury box is illegal, and an indictment returned by said grand jury, on motion of the defendant, should be set aside. (Syllabus by the Court.)

Error from the District Court, Logan County; before John H. Burford, Judge.

N. D. McGinley was convicted of embezzlement, and he brings error. Reversed and remanded.

Devereux & Hildreth and *C. G. Horner,* for plaintiff in error.

C. J. West, Dale & Bierer, and *Ben F. Hegler, Jr.,* for the Territory.

HAYES, J. Plaintiff in error (who, for convenience, will hereinafter be called defendant) was indicted for the crime of embezzlement in the district court of Logan county on the 29th day of November, 1905, which was a day of the regular October, 1905, term. The indictment contained six counts. On the trial, however, the court withdrew from the jury all the counts except the second one, which count charges that the defendant, McGinley, being intrusted with six bonds, issued by school district No. 87 of Kay county, as agent of said school district No. 87, to sell the same, sold said bonds for the sum of $3,000, and converted the proceeds of the same, which proceeds were then and there the property of said school district.

Before pleading to the indictment the defendant moved the court to set aside the indictment on the ground that the grand jury that returned said indictment was not drawn and impaneled as provided by law. The defendant, in said motion, alleges in detail the irregularities complained of in drawing said grand jury; but since the contents of said motion are, in substance, as the facts hereinafter stated, we do not deem it necessary to set forth in full the contents of said motion. A stipulation of facts upon which said motion should be heard was filed. The court overruled the motion to set aside the indictment. Defendant filed a demurrer to the indictment which was overruled by the court, and the case thereupon was tried before a jury. The jury returned a verdict against the defendant, finding him guilty as charged in the second count of the indictment. A motion for a new trial was argued and overruled by the court, and exceptions were reserved, and the defendant was sentenced to imprisonment in the penitentiary at Lansing, Kan., for a term of two years.

Defendant seeks to reverse the judgment of the trial court on 11 assignments of error, but under the view taken by the court in this case it will be necessary to consider only the first assignment of error, which is that the trial court erred in overruling the defendant's motion to set aside the indictment, because of irregularities and illegalities in the formation of the grand jury that returned the same.

At the time the indictment in this case was returned, the statute providing for grand and petit juries and prescribing the manner of forming the same is found in chapter 46, §§ 3308-3319, Wilson's Rev. & Ann. St. 1903 of Oklahoma. The third section of this chapter (section 3310) requires that the county clerk in preparing the pollbooks shall have printed thereon an oath to the effect that the judges of each election precinct when the polls are closed, at the time of making a poll of the votes cast, will select from the list of names on the pollbook to serve as jurors the number of names designated by the county clerk, and that in making such selection they will select only such persons as have the qualifications prescribed in the oath. It further provides that said oath shall be taken by the judges of the election before the same person who administers to them the oath to properly conduct the election; that, before delivering the pollbooks, the county clerk shall estimate the number of jurors that will be required to be drawn from each precinct to make up the number of 350, in the ratio that the vote cast at any precinct at the last general election bears to the whole vote cast in the county, and shall order the judges of election to return that number; that when the election is over the judges of election shall, under their oaths, select from the names on the pollbooks the number of persons to act as jurors designated by the clerk, and shall make a list of same, and sign and return it to the county clerk; that the county clerk shall write the names returned on the lists from all the precincts of the county on separate slips of paper, and place them in a box with lock and key, and keep the same locked, and, from the names placed in the box, grand and petit jurors shall be drawn; that the clerk of the district court, sheriff and county clerk of the county, in drawing a jury panel, shall take the box containing the names and thoroughly shake the same, and then in the manner prescribed shall draw therefrom names, until the required number of grand and petit jurors are drawn; that the names first drawn shall constitute the grand jury for the terms to which they are drawn. It further provides that, if from any cause the judges of election of any precinct fail to make returns of jurors from their precinct, it shall be the duty of the board of county commissioners to take the pollbooks returned from such precinct, and select the number of persons required to serve as jurors from that precinct.

Attorneys for the prosecution insist that the stipulation filed in this case in support of defendant's motion to set aside the indictment cannot be considered, for the reason that same is signed only by attorneys for the defendant, and that it nowhere appears that the prosecution in any manner assented to be bound by said stipulation. An examination of the record discloses the stipulation was not signed at its conclusion by the attorney for the prosecution, but on it appears this indorsement: "No. 1,305. Territory v. N. D. McGinley—Stipulation O. K. F. H. McGuire, County Attorney." From this indorsement, it appears to the court that said stipulation was considered a part of the record in this case, and that same was assented to by the county attorney who represented the territory in the prosecution of the case. It is not very material, however, whether the stipulation is considered a part of the record or not, for the reason that the motion to set aside the indictment is duly sworn to by the defendant, and since same was not controverted, the allegations therein stand as admitted. *Sharp v. United States,* 138 Fed. 883, 71 C. C. A. 258; *Neal v. Delaware,* 103 U. S. 394, 26 L. Ed. 567.

The irregularities in impaneling the grand jury that returned the indictment against defendant, complained of in defendant's motion to set aside the indictment, and as disclosed by the record in this case, are substantially as follows: At the regular election held in Logan county in November, 1902, 5,059 votes were cast. At that time there existed in Logan county 27 election precincts. The county clerk in preparing the pollbooks for the various election precincts at the election in the year 1904, failed in 17 of the precincts of said county to make any proper apportionment or estimate of the number of jurors that should be returned from each of said precincts, and failed to insert said number in blank oaths for the judges of election, and in 10 of the said precincts the judges of election took no oath, as required by law, to return the lists of jurors. In the other 10 precincts of the county correct estimates of jurors were made by the county clerk, the number inserted in the blank oaths, and proper returns were made by the judges of election under oath in the manner and form prescribed by law. Following the election of 1904, the county clerk prepared a jury box, by using the list returned by the judges of election of the various precincts of the county, using the lists from those precincts from which the returns had been irregularly made, as well as the lists from those precincts from which returns had been made in conformity with the law. From the jury box thus formed, the juries were drawn for the different terms of court held subsequent to the election in 1904, and prior to the October, 1905, term of said court. A grand jury was drawn from said box for the October, 1905, term of the court, but, at the time said grand jury was impaneled, various attorneys appeared for their clients, and challenged the array, and the court, after hearing the evidence, and examining the pollbooks and election returns, sustained the challenge to said jury and discharged the same. The court then found that, of the 17 precincts from which returns of jurors had been irregularly made at the election in 1904, the returns from 1 precinct had been corrected by an order of the court. The court then ordered that all names that then remained in the jury box from the 16 precincts in the county from which the returns had been improperly made be taken from the jury box and that the board of county commissioners select names from said precincts in number equal to the full quota or proportion of 350 names that said precincts were entitled to, and that the same be returned to the county clerk of Logan county, and that he place the same in said jury box, thus leaving in said jury box all the names of jurors from those precincts from which jury lists had been properly returned that had not been drawn out from said jury box in the making up of juries for the terms of court held since said jury box was prepared.

The record further discloses that, of the names from the 10 precincts from which returns had been properly made, a great portion had been drawn out of the jury box in the formation of juries theretofore impaneled since the election in 1904, and that there remained in the jury box prepared under the order of the court, and from which the grand jury that returned the indictment in this case was drawn, only a part of the names to which said 10 precincts were entitled under the law. It was clearly the purpose of the court in making said order to have prepared a new jury box to meet the requirements of the rule announced in the case of *Sharp v. United States, supra,* which had been announced by the Circuit Court of Appeals a short time before said order was made by the trial courts; but we think the course directed by said order of the court was not a compliance with the statute, for the reason that the jury box thus formed did not contain names from the various precincts of the county in the proportion prescribed by law. We do not doubt that the court, upon ascertaining that the jury box had been prepared theretofore was irregularly and illegally prepared, had the right to order the same opened, and all the names taken therefrom, or to have entirely discarded said box and ordered a new box prepared, but we think that since the first jury box prepared after the election in 1904, which the trial court found had been irregularly prepared, should have been treated as no jury box at all, and the court should have directed the clerk and the county commissioners to do that which had never been done since the election in 1904, to wit, to form a valid jury box by the county clerk's placing therein all names of jurors from those precincts from which the returns had been properly made, and by the board of county commissioners' furnishing to the clerk lists of jurors from those precincts from which returns had not been properly made, to be placed in the jury box by the county clerk as prescribed by law. By pursuing this course a jury box, containing in the proportion from the various precincts of the county prescribed by law the names of persons that had been furnished the county clerk for jurors either by the judges of election or by the board of county commissioners, could have been prepared in the manner prescribed by law. The jury box formed under the order of the court, from which the grand jury that returned the indictment in this case was drawn, did not contain the names of persons from the various precincts of the county in the proportion the law requires, and never at any time contained names in such proportion, because there were 10 precincts of the county that did not have in said box their proportion of the names of persons for jurors, because a part of the names of all of said precincts had been drawn from said jury box prior to the order of the court, and from several of said precincts over one-half of the names had been drawn.

In commenting upon the purpose of this provision, Justice Phillips, speaking for the court in *Sharp v. United States,* 138 Fed. 878, 71 C. C. A. 285, said:

> "The evident purpose of the Legislature was, first, to place the judges of election upon their consciences under the pains and penalties of perjury in pursuing the course prescribed by the statute in selecting and placing the names of jurors in the jury box. In the second place, it was to prevent the packing of juries by drawing them from particular communities, by requiring the list to be made up proportioned to the number of voters in each precinct in the county."

The court further held in that case that this statutory provision for preparing the jury box is mandatory, and that when the statute is not obeyed, in the formation of a jury, the logical presumption is conclusive that it is hurtful to the defendant.

Able counsel for the prosecution insist, however, that the case of *Sharp v. United States* does not control in the case at bar, and was not binding upon the trial court, for the reason that the defendant, Sharp, in that case was charged with an offense against the criminal statutes of the United States, and not against a territorial statute, and for the reason that the Circuit Court of Appeals has not appellate jurisdiction over the judgments of the Supreme Courts of the territories in cases where prosecutions for violation of territorial statutes are made. To support their contention, the prosecution quotes the following language, from *Aztec Mining Co. v. Ripley,* 151 U. S. 79, 14 Sup. Ct. 236, 3 L. Ed. 80:

> "By the fifteenth section of the Judiciary act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 554] the Circuit Courts of Appeals , in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the Supreme Courts of the several territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and

citizens of the United States, or between either of the classes defined by section 6 of that act, as cases in which the judgments or decrees of the Circuit Courts of Appeals should be final, and therefore the Circuit Court of Appeals for the Eighth Circuit properly declined to take jurisdiction."

But in *Ex parte Moran,* 144 Fed. 594, 75 C. C. A. 396, in which case the petitioner was charged with a capital crime, Judge Sanborn, speaking for the court, said:

"This court has the power to review in that way final decisions of the Supreme Court of Oklahoma in all cases in which the jurisdiction below is dependent upon the citizenship of the opposite parties to the suit, in all admiralty cases, in all cases arising under the patent laws, the revenue laws, and the bankruptcy laws, and in all cases arising under the criminal laws except in cases of the conviction of a capital crime."

In that case, the court, in commenting upon the language quoted, *supra,* from the case of *Aztec Mining Co. v. Ripley,* said:

"It is evident that the words 'of the United States' were either a mere inadvertence, or that it was intended to apply alone to patent or revenue laws. The structure of the clause in the statute is 'in all cases arising under the patent laws, under the revenue laws, and under the criminal laws.' There is nothing in the language employed by the statute to indicate that a review would not apply to cases arising under the criminal laws of the territory as well as those of the United States. All statutes enacted by the territorial government are under authority of the organic act; and decisions of the territorial courts, in the absence of some words of negation or manifest omission in the organic act, are reviewable either by the Supreme Court or by the United States Courts of Appeal; and such has been the practice on appeals and writs of error from the Indian and Oklahoma Territories since the creation of the Courts of Appeals."

In the case of *Miller v. Territory of Oklahoma,* 149 Fed. 330, 79 C. C. A. 269, the jurisdiction of the Circuit Court of Appeals, to review the judgments of the Supreme Courts of the several territories in the character of cases of the case at bar, was presented and passed upon directly by that court, and it held in that case that the Circuit Court of Appeals had jurisdiction to review a conviction for grand larceny in violation of the laws of a territory.

We therefore conclude that the construction of the statute for preparing and impaneling juries as laid down by the Circuit Court of Appeals in *Sharp v. United States* was binding upon the trial court and upon the Supreme Court of the territory of Oklahoma, and that the defendant's motion to set aside the indictment should have been sustained by the trial court.

However much this court may deplore that any of its decisions may result in permitting any one who has violated the law to go unpunished by reason of the fact that the statute of limitation may have run against the offense with which such person is charged, it still remains the duty of this court to apply as expeditiously as possible the law as it has been written by the authorized representatives of the people, and as interpreted by the highest court to which jurisdiction was given in cases similar to the case at bar.

It results that the judgment of the trial court must be reversed, and the cause remanded to the district court, with directions to set aside the judgment of conviction, and set aside the indictment.

All the Justices concur.

HIGGINS *v.* BROWN, *Judge, et al.*

No. 23. Decided March 9, 1908.

(94 Pac. 703.)

1. **JURISDICTION—Territorial Courts—Admission of State—Transfer of Causes.** Sections 16 and 20, inclusive, of the enabling act for Oklahoma, Act June 16, 1906, c. 3335, 34 Stat. 276 277, as amended March 4, 1907. c. 2911, 34 Stat. 1286, 1287, when concurred in by the state of Oklahoma by the adoption of sections 27 and 28 of the Schedule to the Constitution, being a proper exercise of power by the Congress under article 4 sec. 3, of the Constitution of the United States, are valid.
2. **SAME—Pending Indictment for Murder.** An indictment for the crime of murder, alleged to have been committed within the jurisdiction of the United States court for the Northern District of the Indian Territory, and pending in said court on the admission of the state into the Union, is cognizable in the district court of the state, as its successor, in the county in which the offense was committed.
3. **MANDAMUS—When Writ Issues.** A writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right. But it is the only adequate mode of relief where an inferior tribunal refuses to act upon the subject brought properly before it.

(Syllabus by the Court.)

Application of Elmer Higgins for a writ of mandamus to T. L. Brown, judge of the Second Judicial Circuit, and H. Stephens, sheriff. Writ granted, on condition.

On the 18th day of December, 1907, the relator instituted this action in this court, alleging that he was in the custody of the United States marshal for the Eastern District of Oklahoma. That therefore, to wit, on the 9th day of May, 1906, he was indicted in the United States court for the Northern District of the Indian Territory, at Claremore, charged therein with having, on the 10th day of April, 1906, killed one John Hancock in such a manner as to constitute the crime of murder, and upon the return of the indictment he was committed by proper order of said court to the federal jail at Vinita in said district, and that he has ever since said time remained in said jail, and since the admission of the state into the Union he has been in the custody of the United States marshal of said court. That on the 3rd day of December, 1907, he filed this petition in the United States court for the Eastern District of Oklahoma, praying for his release and discharge, and that on the 4th day of said month the judge of said court issued an order directing the marshal to deliver relator over to the proper officers of said district court of the Second judicial district in and for Rogers county. Thereafter, in compliance with said order, said marshal offered to deliver said relator to the respondent Hiram Stephens, sheriff of Rogers county, and that as such sheriff he refused and declined, and still refuses and declines,, to receive relator into his custody. Further, that said T. L. Brown, as judge of the said court, refused to receive and entertain jurisdiction in said cause against the relator, and refused to permit the same to be filed and docketed and become a part of the records of said court. Relator further says that by reason of the refusal of said respondent Hiram Stephens, as sheriff, to receive him into custody, and by reason of said respondent T. L. Brown, judge of said district, refusing to entertain jurisdiction of said cause, this relator is unable to have his cause set for trial, and unable to have bond fixed for his appearance in said court, and that he has no adequate remedy at law to have his rights determined in the premises. Wherefore he prays for a peremptory writ of mandamus to issue from this court, directed to the said respondents, requiring them to take proper action in the premises.

The respondents and the relator, by written stipulation filed in this court on the same date of said petition, agreed that said relator is confined in the United States jail at Vinita in the custody of the United States marshal for said district, by virtue of an indictment regularly returned to the United States court for the Northern District of the Indian Territory, at Claremore, on the 9th day of May, 1906, charging relator with the crime of murder. Further, that at the time of the admission of said state into the Union the cause was pending in the United States court for the Northern District of the Indian Territory, at Claremore, now the county seat of Rogers county, Okla. That on the 4th day of December, 1907, relator secured an order from the judge of the United States court for the Eastern District, directing the United

States marshal for said district to deliver relator to the proper officers of the district court of the Second judicial district of said state for Rogers county. In compliance with said order said relator was tendered to said respondent sheriff, and said sheriff refused to accept said relator on the grounds that the district court of said district had no jurisdiction over said relator, and therefore he was not a proper person to be received into custody by the said officers. That the said T. L. Brown, judge of the said district, refused to entertain jurisdiction of the said relator, and still refuses to, on the ground that said district court was without jurisdiction to hear and determine said cause or make any order therein. That the relator is now in the United States jail at Vinita in the Eastern District of Oklahoma, awaiting action on the part of the sheriff to receive said relator into custody, and that the said relator cannot obtain a hearing on said cause on an application for bail or fix the date of hearing of said cause against him.

Sidell & Shipman and *Leahy & Scott*, for the relator.

Charles West, Atty. Gen., and *W. C. Reaves*, for respondents.

WILLIAMS, C. J. (after stating the facts above). The question is raised as to whether or not Congress, with the concurrence of the state, could provide that the state courts, as successors to the territorial courts, should have jurisdiction to proceed with the final determination or render final judgments in criminal cases, not of a federal character, pending and not finally disposed of, in the district courts of the territory of Oklahoma or in the United States courts in the Indian Territory.

The following states were admitted into the Union without any express provision in the respective enabling acts or acts of Congress for the same to be admitted into the Union, relative to pending cases, not of a federal nature, except as hereinafter stated, and without any express reference as to crimes committed prior to the date of the admission of the state into the Union where prosecutions had not been begun:

Vermont, 1791; Kentucky, 1792; Tennessee, 1796; Ohio, 1803; Louisiana, 1812; Indiana, 1816; Mississippi, 1817; Illinois, 1818; Alabama, 1819; Maine, 1820; Missouri, 1820; Arkansas, 1836; Michigan, 1837; Texas, 1845; Florida, 1845; Iowa, 1846; Wisconsin, 1848; California, 1850; Minnesota, 1858; Oregon, 1859; Kansas, 1861; West Virginia, 1862; Nevada, 1864; Nebraska, 1867; Colorado, 1876; Montana, 1889; North Dakota, 1889; South Dakota, 1889; Washington, 1889; Idaho, 1890; Wyoming, 1890; Utah, 1896.

Florida: Section 1 of chapter 17 of an act to regulate the exercise of the appellate jurisdiction of the Supreme Court of the United States, in certain cases, and for other purposes, Act. Feb. 22, 1847, c. 17, 9 Stat. 128, provides:

"That all and singular the records of the proceedings in the several cases which were pending in the superior courts of the late territory of Florida, under and by virtue of the act of Congress of the twenty-third of May, eighteen hundred and twenty-eight, entitled 'An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida,' and under and by virtue of an act entitled 'An act to provide for the final settlement of land claims in Florida,' approved twenty-sixth May, eighteen hundred and thirty, and in the several cases which were pending in the Court of Appeals of the same territory, on the 3rd day of March, in the year of our Lord one thousand eight hundred and forty-five, and all and singular the records of the proceedings in the several cases in which judgments or decrees had been rendered in the said courts on or before that day, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken, and prosecuted to the Supreme Court of the United States, according to the laws of the United States, which were in force on the said third day of March, in the year of our Lord one thousand eight hundred and forty-five, shall, from and after the passing of this act, be transferred to and deposited in the District Court of the United States for the District of Florida."

Section 3 of said act further provides:

"And be it further enacted, that in all cases in which judgment or decrees have been rendered in the said superior courts or Court of Appeals of the late territory of Florida, and from which writs of error have been sued out or appeals have been taken to the Supreme Court of the United States, the said Supreme Court shall be, and is hereby, authorized to hear and determine the same, and the mandates of the said Supreme Court for the execution of the judgments or decrees so to be rendered by them and all other writs which may be necessary in the exercise of the appellate jurisdiction of the said court in such cases, shall be directed to the District Court of the United States for the District of Florida; and the said District Court shall cause the same to be executed and obeyed."

Section 4 of said act further provided:

"And be it further enacted, that the District Court of the United States for the District of Florida shall take cognizance of all cases which were pending and undetermined in the said superior courts, under and by virtue of the act of Congress of the twenty-third May, eighteen hundred and twenty-eight, entitled 'An act supplementary to the several acts providing tor the settlement and confirmation of private land claims in Florida,' and under and by virtue of an act entitled 'An act to provide for the final settlement of land claims in Florida,' approved twenty-sixth May, eighteen hundred and thirty, and all cases which were pending and undetermined in the Court of Appeals of the late territory of Florida, and from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals could have been taken to the Supreme Court of the United States, under the laws which were in force on the third day of March, in the year of our Lord one thousand eight hundred and forty-five, and shall proceed to hear and determine the same; and from the judgments or decrees to be rendered by the said District Court, writs of error may be sued out or appeals may be taken to the Supreme Court of the United States, in the same manner as if such judgments or decrees had been rendered in the Court of Appeals of the territory of Florida; and the mandates and all writs necessary to the exercise of the appellate jurisdiction of the said Supreme Court in such cases shall be directed to the District Court of the United States for the District of Florida, and the said District Court shall cause the same to be duly executed and obeyed."

Section 5 further provides:

"And be it further enacted, that in all cases not legally transferred to the state courts in which judgments or decrees have been rendered in the superior courts or Court of Appeals of the late territory of Florida from which writs of error could have been sued out or appeals could have been taken to the Court of Appeals of said territory, or to the Supreme Court of the United States, under the laws which were in force on the third day of March, in the year of our Lord one thousand eight hundred and forty-five, and in which writs of error have not hitherto been sued out or appeals have not hitherto been taken, there shall be allowed to the parties in the said causes the term of one year from and after the passing of this act, for suing out such writs of error or taking such appeals to the Supreme Court of the United States, which shall have jurisdiction to review the same."

Section 6 of said act further provided:

"And be it further enacted, that any unfinished business or proceedings now remaining or pending before the judge of the superior court at St. Augustine, as a commissioner under and by virtue of the 'Act for the relief of certain inhabitants of East Florida,' approved twenty-sixth June, eighteen hundred and thirty-four, or under any other act granting special powers or imposing special duties upon said judge be and the same are hereby transferred to the judge of the District Court of the District of Florida, to be proceeded in and finished, or decided, in the same manner provided for by law; and the said District Judge shall have, exercise and possess the same duties, powers, and rights, which have by virtue of the act of twenty-sixth June, eighteen hundred and thirty-four aforesaid, or otherwise, been possessed and exercised by the said judge of the superior court of St. Augustine, so far as may be necessary to enable the said District Judge to determine and finish any matter, business or proceedings now pending and undetermined before the judge of the superior court aforesaid, by virtue of any such special act."

Michigan: Section 7 of said act further provided:

"And be it further enacted, that all and singular the provisions of this act, so far as may be, shall be, and they are hereby, made applicable to all cases which were pending in the supreme or other superior courts of and for the late territory of Michigan at the time said state was admitted as a state into the Union, and to all cases in which judgments or decrees have been rendered in said supreme or superior court of said late territory of Michigan, and not hitherto removed as aforesaid by writ of error or appeal."

Blanket provision: Section 1 of chapter 12, of Act Feb. 22, 1848, 9 Stat. 211, being an act supplementary to the act entitled "An act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases, and for other purposes," provides as follows:

"* * * That all and singular the provisions of the act entitled 'An act to regulate the exercise of appellate jurisdiction of the Supreme Court in certain cases, and for other purposes,' approved February twenty-second, eighteen hundred and forty-seven, to which this is a supplement so far as may be, shall be, and they hereby are, made applicable to all cases which were pending in the Supreme Court or other superior court of and for the late territory of Iowa at the time said territory was admitted into the Union as a state, and to all cases in which judgments or decrees have been rendered in said supreme or superior court of the said late territory of Iowa, and not hitherto removed as aforesaid by writ of error or appeal."

Section 2 of said act is as follows:

"* * * That all and singular the provisions of the said act to which this is a supplement, so far as may be, shall be and they hereby are made applicable to all cases which may be pending in the supreme or other superior court of and for any territory of the United States which may hereafter be admitted as a state into the Union at the time of its admission, and to all cases in which judgments or decrees shall have been rendered in such supreme or superior court at the time of such admission, and not previously removed by writ of error or appeal."

Iowa: Section 3 of said act is as follows:

"* * * That all cases, together with all process, records, orders, judgments, decrees, and proceedings of federal character or jurisdiction, and not legally transferred to the state courts of the state of Iowa, pending prior to and at the time of the admission of the said state of Iowa into the Union, in the district or supreme courts of the said territory of Iowa, are hereby transferred to the District Court of the United States for the District of Iowa; and it shall be the duty of the respective clerks of the said courts of the said territory of Iowa, or their successors in office, with whom the records and proceedings of said cases may be found, upon application by any person or persons interested therein, to make and certify a full and complete copy of the records thereof, and transmit the same, together with all the original process, pleadings and other papers filed in such case or cases, and which may be removed without mutilating the records of said courts, to the clerk of the District Court of the United States, and when the said records, papers and proceedings shall be thus certified to the said last-mentioned court, its jurisdiction shall be deemed as full and complete as that of the court in which the said case originated, had been prior to the said admission of the state of Iowa. or as if the said case had been originally instituted in said District Court of the United States."

Wisconsin: Act May 29, 1848, c. 50, 9 Stat. 233:

"Sec. 5. And be it further enacted, that the clerks of the district courts of the territory of Wisconsin, shall, before their term of office expires, certify under seal, and transmit to the clerk of said courts, all records of all unsatisfied judgments, and of suits pending in said courts respectively, attaching thereto all papers connected therewith, in all cases arising under the laws or Constitution of the United States, or to which the United States shall be a party; and they shall forward the same to the clerk of said district court of the state of Wisconsin, who shall enter the same in his docket, and the said district court shall proceed therein to final judgment and execution, as if such suits or proceedings had originally been brought in said court."

"Sec. 6. And be it further enacted, that the clerk of the Supreme Court of the territory of Wisconsin shall deliver over to the clerks of said district court all records and papers in the office of the clerk of the said Supreme Court relating to proceedings in bankruptcy under the late bankrupt law of the United States. He shall also certify, under seal, and deliver to said clerk, all records of judgments and of proceedings in suits pending, and all papers connected therewith, in cases arising under the Constitution and laws of the United States." (Act May 29. 1848, c. 50, 9 Stat. 233.)

California: In section 11 of an act providing for the extension of the laws and the judicial system of the United States to the state of California, Act Sept. 30, 1850, found in chapter 90, 9 Stat. 521, it is provided "that all civil causes now pending in any of the courts of California, the jurisdiction of which may properly belong to the courts of the United States therein established, shall be removed to the said United States courts, either by writ of certiorari or by a transfer of the original papers with an exemplification from the record or docket entry, under the seal of the court from which they shall be removed. * * *"

Minnesota: Section 3 of an act for the admission of the state of Minnesota into the Union, Act May 11, 1858, c. 32, 11 Stat. 285, provided that "in all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the territory, the mandate of execution or order of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Minnesota, or to the Supreme Court of the state of Minnesota, as the nature of such appeal or writ of error may require; and each of those courts shall be the successor of the Supreme Court of the Minnesota Territory, as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein."

Oregon: Act March 3, 1859 (section 4, c. 85, 11 Stat. 437), provided:

> "* * * That in all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of Oregon Territory, the mandate of execution or order of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Oregon, or to the Supreme Court of the state of Oregon, as the nature of such appeal or writ of error may require; and each of those courts shall be the successor of the Supreme Court of Oregon Territory, as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein."

Kansas: Section 4 of an act for the admission of the state of Kansas into the Union, Act Jan. 29, 1861, c. 20, 12 Stat. 128, provided, "and in all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of Kansas Territory, the mandate of execution or order of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Kansas, or to the Supreme Court of the state of Kansas, as the nature of such appeal or writ of error may require; and each of those courts shall be the successor of the Supreme Court of Kansas Territory.

as to all such cases, with full power to hear and determine the same and to award mesne or final process therein."

Nevada: Section 8 of the act of Congress relative to Nevada provides:

"And be it further enacted, that all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the territory of Nevada, may be heard and determined by the Supreme Court of the United States, and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the state of Nevada, as the nature of said appeal or writ of error may require, and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein. And from all judgments and decrees of the Supreme Court of the territory of Nevada, prior to its admission into the Union as a state, the parties to said judgments and decrees shall have the same right to prosecute appeals and writs of error to the federal courts as they would have had under the laws of the United States if this act had been passed simultaneously with the act admitting said state into the Union; provided, that said appeals shall be prosecuted and said writs of error sued out at any time before the first day of July, eighteen hundred and sixty-six."

Section 9 of the same act further provides:

"And be it further enacted, that no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession." (Act Feb. 27, 1865, c. 64, 13 Stat. 440.)

Nebraska: Act March 25, 1867, c. 7, § 6, 15 Stat. 5, provides:

"That all cases of appeal or writ of error, heretofore prosecuted, and now pending in the Supreme Court of the United States upon any record from the Supreme Court of the territory of Nebraska, or which may hereafter be prosecuted from said court as herein allowed, may be heard and determined by the Supreme Court Court of the United States, and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the Circuit or District Court of the United States for the District of Nebraska, as the nature of said appeal or writ of error may require, and each of those courts shall be the successor of the Supreme Court of Nebraska Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein. And from all judgments and decrees of the Supreme Court of the territory of Nebraska, prior to its admission as a state the parties to said judgments and decrees shall have the same right to prosecute appeals and writs of error to the federal courts as they had under the laws of the United States prior to the admission of the state of Nebraska into the Union."

Colorado: Section 5 of an act to further the administration of justice in the state of Colorado, Act June 26, 1876, c. 147, 19 Stat. 62, provides:

"That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the Supreme Court of the territory of Colorado, or that may hereafter be lawfully prosecuted from said court, may be heard and determined by the Supreme Court of the United States, and the remand of execution or of further proceedings shall be directed by the Supreme Court of the United States to the Circuit or District Court of the District of Colorado , or to the Supreme Court of the state of Colorado, as the nature of the case may require; and each of said last-mentioned courts shall be the successor of the Supreme Court of Colorado Territory as to all such cases, with full power to proceed with the same and to award mesne or final process therein."

Section 6 of said act provides:

"That from all judgments and decrees of the Supreme Court of the territory of Colorado prior to its admission as a state, the parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court as they shall have had by law prior to the admission of said state into the Union."

Section 8 of the same act provides:

"That in respect of all cases, proceedings, and matters pending in the supreme or district courts of the territory of Colorado at the time of the admission of said state into the Union, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts respectively shall be the successors of said supreme and district courts of said territory; and all the files, records, and proceedings relating thereto shall be transferred to said Circuit and District Courts, respectively, and the same shall be proceeded with therein in due course of law."

Montana, North Dakota, South Dakota, and Washington: Section 22 of an act for the division of Dakota into two states, Act Feb. 22, 1889, c. 180, 25 Stat. 676, provided:

"That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the Supreme Court of either of the territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts may be heard and determined by said Supreme Court of the United States. and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the Circuit or District Court hereby established within the state succeeding the territory from which such record is or may be pending, or to the Supreme Court of such state, as the nature of the case may require."

"With the proviso, that the mandate of execution or of further proceedings shall, in cases arising in the territory of Dakota, be directed by the Supreme Court of the United States to the Circuit or District Court of the District of South Dakota, or to the Supreme Court of the state of North Dakota, as the nature of the case may require, and each of the circuit, district and state courts herein named shall, respectively, be the successor of the Supreme Court of the territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively, with full power to proceed with the same, and award mesne or final process therein, and that from judgments and decrees of the Supreme Court of either of the territories mentioned in this act. in any case arising within the limits of any of the proposed states prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said state into the Union."

Section 23 of said act provides:

"That in respect to all cases, proceedings and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said territory; and in respect to all other cases, proceedings, and matters pending in the Supreme or District Courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments and proceedings relating to any such cases,.shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the states mentioned in this act, shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or state court, as the case may be; provided, however, that in all civil actions, causes and proceedings, in which the United States is not a party, transfer shall not be made to the Circuit and District Courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts."

Idaho: Same provisions as apply to Montana. Act July 3, 1890, c. 656, 26 Stat. 215.

Wyoming: Same as Idaho. Act July 10, 1890, c. 664, 26 Stat. 222.

Utah: Section 17 of an act to enable the people of Utah to form a Constitution, etc., Act July 16, 1894, c. 138, 28 Stat. 107, provides:

"That the convention herein provided for shall have the power to provide by ordinance for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of the said state into the Union, to such courts as shall be established under the Constitution to be thus formed, or to the Circuit or District Court of the United States for the District of Utah; and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the laws thereof, respectively. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the Supreme Court of said territory, or that may hereafter lawfully be prosecuted upon any record from said court, may be heard and determined by said Supreme Court of the United States and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the Circuit or District Court hereby established within the said state from or to the Supreme Court of such state, as the nature of the case may require; and the circuit, district, and state courts herein named shall, respectively, be the successors of the Supreme Court of the territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the Supreme Court of the territory, mentioned in this act, in any case arising within the limits of the proposed state prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said state into the Union."

In the cases of West Virginia, Nevada, Nebraska, Colorado, North and South Dakota, Montana and Washington, Utah and Oklahoma, these states have been admitted by proclamation of the President of the United States, pursuant to the provisions of the enabling acts, and Wyoming and Idaho were admitted after they had formed Constitutions, not under an enabling act, but by act of Congress. We find that in all the states that were admitted by an act of Congress, and not by proclamation of the President, the state courts, with provisions in the schedules of their Constitutions permitting such jurisdiction, have exercised the same in cases like the one at bar and why should the state courts of Oklahoma likewise not exercise like jurisdiction? It undoubtedly is in accordance with the rule laid down in *Benner v. Porter*, 9 How. (U. S.) 235, 13 L. Ed. 119, being necessary for the Congress to concur in order for the jurisdiction to attach to the state courts. And unquestionably where a state had formed a Constitution and provided therein that the state courts should become the successors of like courts under the territorial form of government, and that as to criminal cases, not of a federal nature, the same should be prosecuted to final judgment in such court; that when Congress admitted such a state into the Union with such a provision in its Constitution it expressly concurred in and agreed to such provision. In the case of West Virginia, Nevada, Colorado, North and South Dakota, Montana, Washington, Utah, and Oklahoma, where the Constitutions were formed under an enabling act, and by virtue of that enabling act a proclamation was issued by the President of the United States admitting such state or states into the Union under the Constitution thus formed containing like provisions in like manner, did not the federal government concur in such provisions in like manner as if such states had been admitted directly by act of Congress? Should it be urged by counsel that the President had no such constitutional authority, he would be contending for a proposition that would be tantamount to declaring that Oklahoma was not legally in the Union of states. This court certainly will not make such a declaration—will not repudiate the power that brought it into active existence.

So far as we have been able to find from the date of the admission of Vermont in 1791 to that of Oklahoma in 1907 no provision has ever been made by express act of Congress for the prosecution of criminal offenses, not of a federal nature, where proceedings had not been instituted prior to the admission of the state into the Union, and prior to the supplemental legislation relative to Florida and Iowa in 1847 no provision has ever been made relative to pending criminal cases, not of a federal nature. It would be very salutary to consider the particular contemporaneous and subsequent practical construction of the powers of the states through their courts as successors to the territorial courts to prosecute to final determination pending cases or offenses committed, but where prosecutions had not been begun at the time of the admission of the state into the Union. For where there has been a particular construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction seem to present themselves to the courts with such plausibility and force that is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially where this has occurred contemporaneously with the adoption of the Constitution or statute, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that the presumption exists that the construction rightly interprets the intention. And when this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by the decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight. *Stuart v. Laird,* 1 Cranch (U. S.) 299, 2 L. Ed. 115; *Martin v. Hunter's Lessee,* 1 Wheat. (U. S.) 304, 4 L. Ed. 97; *Cohens v. Virginia,* 6 Wheat. (U. S.) 264, 5 L. Ed. 257; *Bank of United States v. Halstead,* 10 Wheat. (U. S.) 51, 6 L. Ed. 264; *Ogden v. Saunders,* 12 Wheat. (U. S.) 290, 6 L. Ed. 606; *Pike v. McGoun,* 44 Mo. 491; *State c. Parkinson,* 5 Nev. 15; *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627; *Ex parte Reynolds,* 52 Ark. 330, 12 S. W. 570; Story on Constitutions, §§ 405-408; Cooley's Constitutional Limitations (7th Ed.) pp. 102-104.

Every state that has been admitted into the Union, with the exception of Vermont, through its constitutional convention has provided that all actions or prosecutions shall continue as if no change had taken place in the territorial form of government.

Kentucky: Constitution, Schedule, 1792:

"That no inconvenience may arise from the establishing of the government of this state, and in order to carry the same into complete operation, it is hereby declared and ordained, that all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if the said government had not been established."

Tennessee: Section 1, Schedule, Const. 1796:

"That no inconvenience may arise from a change of the temporary to a permanent state government, it is declared that all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place in the administration of government."

Ohio: Section 1, Schedule, Const. 1802:

"That no evils or inconveniences may arise from the change of a territorial government to a permanent state government, it is declared by this convention, that all rights, suits, actions, prosecutions, claims, and contracts, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government."

Louisiana: Section 1, Schedule, Const. 1812:

"That no inconvience may arise from a change of a territorial to a permanent state government, it is declared by the convention that all rights, suits, actions, prosecutions, claims and contracts, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government, in virtue of the laws now in force."

Indiana: Section 1, art. 12, Const. 1816:

"That no evils or inconvenience may arise from the change of a territoral government to a permanent state government, it is declared by this Constitution that all rights, suits, actions, prosecutions, recognizances, contracts, and claims, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government."

Mississippi: Section 1, Schedule, Const. 1817:

"That no inconvenience may arise from a change of territorial to a permanent state government, it is declared that all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

Illinois: Section 1, Schedule, Const. 1848:

"That all laws in force at the adoption of this Constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this state, individuals or bodies corporate, shall continue and be as valid as if this Constitution had not been adopted."

Alabama: Section 1, Schedule, Const. 1819:

"That no inconvenience may arise from a change of territorial to a permanent state government, it is declared that all rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; and all process, which shall, before the third Monday in September next, be issued in the name of the Alabama Territory, shall be as valid as if issued in the name of the state."

Maine: Section 1, Schedule, Const. 1820:

"All laws now in force in this state, and not repugnant to this Constitution, shall remain and be in force until altered or repealed by the Legislature or shall expire by their own limitation."

In *Darcrow's Case,* 6 Greenl. (Me.) 148, the courts of the state of Maine assumed jurisdiction of an offense committed within the territory of that state, which was formerly a part of the Commonwealth of Massachusetts, and where the indictment was returned after Maine was erected into a state.

Missouri: Section 1, Schedule, Const. 1820:

"That no inconvenience may arise from a change of government we declare that all writs, actions, prosecutions, judgments, claims, and contracts of individuals and of bodies corporate, shall continue as if no change had taken place; and all process which may, before the third Monday in September next, be issued under the authority of the territory of Missouri shall be as valid as if issued in the name of the state."

Arkansas: Section 1, Schedule, Const. 1836:

"That no inconvenience may arise from the change of government we declare that all writs, actions, prosecutions, judgments, claims, and contracts of individuals and bodies corporate, shall continue as if no change had taken place; and all process which may be issued under the authority of the territory of Arkansas, previous to the admission of Arkansas into the Union of the United States, shall be as valid as if issued in the name of the state."

In the case of *Hudspeth v. State,* 1 Ark. 20, the defendant evidently was convicted in the city court of Little Rock prior to the admission of the state into the Union, where the defendant was prosecuted in the name of the United States. This appeal was dismissed on account of irregularities, but never an intimation that such action did not continue and survive the change from a territory to a state.

Michigan: Section 1, Schedule, Const. 1835:

"That no inconvenience may arise from a change of the territorial government to a permanent state government, it is declared that all writs, actions, prosecutions, contracts, claims, and rights of individuals and of bodies corporate shall continue as if no change had taken place in this government; and all process which may, before the organization of the judicial department under this Constitution, be issued under authority of the territory of Michigan, shall be as valid as if issued in the name of the state."

In the case of *People v. Richards,* 1 Mich. 217, 51 Am. Dec. 75, the defendants were indicted for a public offence in 1833, about five years prior to the admission of the state into the Union. The Supreme Court of the state of Michigan, as successor to the territorial appellate court, assumed jurisdiction.

Texas: Section 2, article 13, Schedule, Const. 1845, reads as follows:

"* * * * ; and all criminal prosecutions or penal actions which shall have arisen prior to the organization of the state government under this Constitution in any of the courts of the republic of Texas, shall be prosecuted to judgment and execution in the name of said state. All suits at law and equity which may be depending in any of the courts of the republic of Texas, prior to the organization of the state government under this Constitution, shall continue and remain in force as the laws of this state until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof."

Section 3 also reads as follows:

"All laws or parts of laws now in force in the republic of Texas, which are not repugnant to the Constitution of the United States the joint resolutions for annexing Texas to the United States, or the provisions of this Constitution, shall continue and remain in force as the laws of this state until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof."

In *Drummond v. The Republic of Texas,* 2 Tex. 157, the appellant was indicted and convicted under virtue of an act to suppress gaming. A motion was made in arrest of judgment, embracing a variety of objections to the irregularity and legality of the proceedings, which motion was overruled and the cause certified to the Supreme Court for revision. Among the grounds embraced in the motion in arrest are the following: Because said prosecution was not carried on in the name or by the authority of the republic of Texas. Mr. Justice Wheeler, speaking for the court, said:

"No prescibed form of words is necessary in order that the prosecution be carried on 'in the name and by the authority of the republic of Texas.' It is enough that the prosecution is conducted by the proper law officer, acting under the authority and conducting the prosecution in the name of the government."

In the case of *Holt v. State,* 2 Tex. 364, where the appellant was indicted at the fall term, 1844, Washington county district court, for an affray, the prosecution was pending until the fall term, 1846, after Texas had been admitted into the Union, when the accused was tried and found guilty and judgment was pronounced against him, the prosecution being then conducted in the name of the state. He subsequently prosecuted his writ of error to reverse the judgment upon the ground that the "indictment and alleged offense were both previous to the passage of the law (enacted by the state) authorizing the assessing of fines by juries." Mr. Justice Wheeler, speaking for the court said:

"This prosecution was pending at the period of the adoption of the state Constitution, and comes within the provision of the second section of article 13."

Florida: Section 1, Schedule, Const. 1838:

"That all laws or parts of laws now in force, or which may hereafter be passed by the Governor and Legislative Council of the territory of Florida, not repugnant to the provisions of this Constitution, shall continue in force until, by operation of their provisions or limitations, the same shall cease to be in force, or until the General Assembly of the state shall alter or repeal the same; and all writs, actions, prosecutions, judgments, and contracts shall be and continue unimpaired; and all process which has heretofore issued, or which may be issued prior to the last day of the first session of the General Assembly of this state, shall be as valid as if issued in the name of the state; and nothing in this Constitution shall impair the obligation of contracts, or violate vested rights, either of individuals, or of associations claiming to exercise corporate privileges in this state."

In the case of the *State v. Call*, 1 Fla. 92, the defendant was indicted, for obstructing a water course, in the superior court of Wakulla county in 1844, under the territory of Florida, and was tried and convicted prior to the admission of the state into the Union. The appeal or writ of error was dissmissed because the proper notice was not given. No intimation that there was no jurisdiction because Congress had failed to provide for the continuance of the jurisdiction of such cases was made.

Iowa: Section 3, Schedule, Const. 1846:

> "All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts shall be prosecuted to final judgment and execution; and all appeals, writs of error, *certiorari*, and injunctions shall be carried on in the several courts, in the same manner as now provided by law, and all offenses, misdemeanors, and crimes that may have been committed before the taking effect of this Constitution, shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this Constitution been made."

In the case of *Cook et al. v. United States*, 1 G. Greene (Iowa) 56, was a prosecution begun against the appellants upon an indictment for a riot, and a verdict and judgment was had in the Supreme Court of the state of Iowa at its July term, 1847, reversed said cause. Mr. Justice Kenny said:

> "The record entry of the clerk shows that the jury found the defendants guilty only. The verdict of the jury as contained in the bill of exceptions shows that the jury found them guilty, and assessed their fine at three dollars and fifty cents, and imprisonment one hour. In the first there is error, as the jury should have assessed the fine. In the latter, there is also error, as the jury had no right to fix the time of imprisonment. In the judgement there is error, as the court, under the statute, in a case of this kind, had no right to fine the defendants. As the verdict upon the record is erroneous, it is not necessary to pass upon the other points raised by the assignment of error, or to determine whether the court had a right to amend the verdict after the jury had dispersed. If the verdict had been amended, it should appear in legal form on the record. The judgment of the court below will therefore be reversed, and the cause remanded for a new trial."

In the case of *Bonsell v. United States*, 1 G. Greene (Iowa)

112. appellant, Jacob Bonsell, was tried in the district court of Linn county, territory of Iowa, March term, 1844, on a charge of larceny for stealing a mule. A verdict of the jury impaneled and sworn to try the cause on the plea of not guilty was rendered, finding him guilty of the charge in the indictment. The judgment of the territorial court was affirmed by the Supreme Court of the state.

In the case of *State v. Douglass,* 1 G. Greene (Iowa) 550, the defendant was prosecuted before a justice of the peace of the territory for an assault. Tried by a jury, verdict of guilty rendered, and fine assessed at $5. The cause was then taken to the district court of the state by writ of *certiorari* and there reversed, and was then taken upon a writ of error from the district court upon the part of the state to the Supreme Court. Whereupon the verdict of the district court was reversed, with costs, and the cause remanded.

Wisconsin: Section 1, Schedule, Const. 1848:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no such change had taken place, and all process which may be issued under the authority of the territory of Wisconsin, previous to its admission into the Union of the United States, shall be as valid as if issued in the name of the state."

California: Section 1, Schedule, Const. 1849:

"All rights, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted."

In the case of the *People v. Daniels,* 1 Cal. 107, the defendant was indicted by a grand jury impaneled on the 30th day of August, A. D. 1849, prior to the admission of California into the Union, John W. Geary, sitting as judge of the court of the first instance, in the district of San Francisco, territory of Upper California, the defendent being charged with the crime of murder.

Hastings, C. J. for the court said:

"It will be unnecessary to enter into a detail of the proceedings in the case, from the fact that the laws of the country then in force were but imperfectly understood, and error and irregularity are found in all the proceedings of the courts, especially in criminal cases. The errors in this record are so numerous that the execution of the defendant would not be the judgment of the law, but the mere will of the court and executioner. We therefore think that the defendant ought ***again*** be put upon his trial upon an indictment presented by a *regular grand jury, and that the defendant be held* in custody to abide the order of the district court."

Minnesota: Section 1, Schedule, Const. 1857:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims, and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; and all process which may be issued under the authority of the territory of Minnesota previous to its admission into the Union of the United States shall be as valid as if issued in the name of the state."

Oregon: Section 9, Schedule, Const. 1859:

"Crimes and misdemeanors committed against the territory of Oregon shall be punished by the state as they might have been punished by the territory if the change of government had not been made."

Kansas: Section 1, Schedule, Const. 1859:

"That no inconvenience may arise from the change from a territorial government to a permanent state government, it is declared by this Constitution that all suits, rights, actions, prosecutions, recognizances, contracts, judgments, and claims, both as respects individuals and bodies corporate, shall continue as if no change had taken place."

West Virginia: Section 8, article 11, Const. 1863:

"Such parts of the common law and the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature. All offenses against the laws of Virginia heretofore committed within the bounderies of this state shall be cognizable in the courts of this state in the same manner they would if hereafter committed within this state. All civil or criminal suits or proceedings pending in the county or circuit courts of the state of Virginia, held within the said boundaries, shall be docketed and thereafter proceeded in before the circuit court of the proper county; and all such suits and proceedings pending in the supreme and district courts of appeals of the state of Virginia, if the defendant in the court below resides within the said boundaries, or the subject of the suit is land or other property situated or being therein, and the plaintiff is entitled to prosecute in this state, shall be docketed, and thereafter proceeded in before the Supreme Court of Appeals thereof."

Nevada: Section 1, Schedule, Const 1864:

"That no inconvenience may arise by reason of a change from a territorial to a permanent state government it is declared that all rights, actions, prosecutions, judgments, claims, and contracts, as well of individuals as of bodies corporate, including counties, towns, and cities, shall continue as if no change had taken place, and all process which may issue under the authority of the territory of Nevada previous to its admission into the Union as one of the United States, shall be as valid as if issued in the name of the state of Nevada."

In the case of *People v. Bonds,* 1 Nev. 31, the defendant was indicted for murder in the Third judicial district of the territory of Nevada, and tried and found guilty of murder in the second degree. At the January term, 1865, of the state Supreme Court, this cause was reversed on account of errors occurring at the trial, without any reference to the crime having been one committed and tried under the territorial government. The following is the language of the court in reversing the same: "For these reasons the judgments must be reversed and new trial ordered."

In the case of *The People v. Logan,* 1 Nev. 110, the defendant was indicted by the grand jury of Ormsby county, territory of Nevada, charging him with a public offense committed under the territory of Nevada, and a demurrer was sustained to the indictment prior to statehood, from which the territory appealed. The Supreme Court of the state, at the January term, 1865, sustained the lower court.

In the case of *The People v. Gleason,* 1 Nev. 173, the defendant, in the district court of the Third judicial district of the territory of Nevada, was indicted, charged with the crime of murder, and tried and convicted about April, 1864, prior to the admission of Nevada into the Union. An appeal was prosecuted after statehood to the Supreme Court on account of refusal of instructions as to the law governing the case. The judgment of the court below was set aside and reversed, and a new trial granted.

In the case of *Ex parte Janes,* 1 Nev. 319, in the month of April, 1864, Janes was convicted of murder in the first degree, in Storey county, territory of Nevada, and sentenced to be executed on the 2nd day of June, 1864. Before the day of execution arrived the Governor of the then territory of Nevada issued in his official capacity a paper purporting to be a commutation of the sentence of Janes, and directing him to be delivered over by the sheriff of Storey county to the warden of the territorial prison or penitentiary, and requiring the warden to hold him in prison during his natural life. By authority of this paper and none other, he was delivered over to the warden some time in 1864, and by him retained in custody. On the 3rd day of December, 1864, J. W. Nye, then acting as Governor of the state of Nevada, under the provisions of the Constitution which continued the territorial Governor in that position until the election and qualification of the new state officers issued another paper granting, or purporting to grant, a pardon to the petitioner, coupled with two conditions: First. That the pardon should not take effect for six months. Second. That the petitioner should leave the state of Nevada, and not return thereto. At the end of six months from the date of this paper the warden of the penitentiary released the prisoner, and he left the state. Upon being informed by the warden that his authority to release him had been questioned, and a request made that he would return and deliver himself up until the law governing the case could be settled, he voluntarily returned, delivered himself to the warden, and sued out this writ. The first question to determine was, was Janes originally committed to the keeping of the warden by any legal authority? Under the organic act of the territory the Governor had the power to pardon persons who had been convicted of murder. The general power to pardon carried with it the power to pardon on conditions. If a condition precedent be imposed, that condition must be performed, or the pardon never takes effect. The following was the judgment of the Supreme Court of said state:

> "Under the provisions of this section the prisoner is ordered to be delivered into the hands of the sheriff of Storey county, to be by him held until further orders of the district court of the First judicial district. Whether the original judgment directing the execution of the prisoner was sufficiently specific to have justified the sheriff in carrying the sentence into execution, need not be determined in this proceeding. Doubtless the district court can enter a sufficient judgment. We are satisfied the sheriff had no authority to release the prisoner, nor to intrust him to the custody of any other person than the jailor of Storey county,or some deputy or bailiff of the sheriff for safe keeping."

In the case of *State v. Logan,* 1 Nev. 509 (see *People v. Logan,* 1 Nev. 110), the case was again reversed on the ground that the indictment ought to have been quashed because it was found on improper evidence.

Nebraska: Section 1, Schedule, Const. 1866-67:

> "That no inconvenience may arise from the change of territorial government to a state government, it is declared, that all rights, suits, actions, prosecutions, judgments, recognizances, claims and contracts, both as respects persons and bodies corporate, shall continue and be enforced as if no change had taken place, and all laws now in force shall remain in force until altered, amended or repealed by the Legislature: Provided, wherever the word 'Territory' shall occur, it shall be construed to mean state, whenever it may be necessary in order that such laws may conform to the state government."

Colorado: Section 1, Schedule, Const. 1876:

> "That all laws in force at the adoption of this Constitution shall, so far as not inconsistent therewith, remain of the same force as if this Constitution had not been adopted until they expire by their own limitation, or are altered or repealed by the General Assembly; and all rights, prosecutions, actions, claims, and con-

tracts of the territory of Colorado, counties, individuals, or bodies corporate, (not inconsistent therewith), shall continue as if the form of government had not been changed and this Constitution adopted."

In the case of *Wilson v. The People,* 3 Colo. 325, that was a case, where at the October term, 1876 after admission of the state into the Union, the defendant was indicted on the charge of murder, tried thereon, found guilty and sentenced. The crime was committed prior to the admission of the state into the Union. Without the question being raised, the judgment of the lower court was affirmed and the prisoner sentenced.

In the case of *Packer v. People,* 8 Colo. 362, 8 Pac. 564, the plaintiff was indicted, tried and convicted at the April term, 1883. of the district court of Hinsdale county for the murder of Israel Swan. The indictment charged that said murder was committed by the prisoner in Hinsdale county on the 1st of March, 1874; said Hinsdale county then being in the territory of Colorado, but at the time of the trial in the state of Colorado. The jury returned a verdict as charged in the indictment. Beck, C. J., said:

"The objection made to the concluding clause of the indictment appears to us to be wholly without merit. It was that the indictment concludes that the killing was committed against the peace and dignity of the people of the state of Colorado; whereas, say the counsel, there was no state of Colorado in existence at the time of the killing in March, 1874. True, the form of government has been changed since the latter date from the territorial form to that of a state. The views of Attorney General Urmy, that no rights were forfeited by the transition, is an answer to this whole line of argument. The same citizens who comprised the territorial government were the citizens who framed and adopted the state Constitution; and upon its taking effect they immediately became citizens of the new state. Instead of sweeping away by a dash of the pen the laws which had been made by this same citizenship, and by which the territory had been governed for many years, the whole body of laws was preserved by the Constitution as the laws of the state, both in civil and in criminal matters, until they should be amended or repealed by the state Legislature, and other provisions made to supply their place."

Montana: Section 3, Schedule, Const. 1889:

"No crime or criminal offense committed against the laws of the territory of Montana shall abate, or be in any wise affected, by reason of the change from a territorial to a state form of government; but the same shall be deemed and taken to be an offense against the laws of the state, and the appropriate courts of the state shall have jurisdiction over and to hear and determine the same: Provided, that this section shall not in any wise be construed to change the law of the statute of limitations, or the due effect or application of the same."

In the case of the *State v.Williams,* 9 Mont. 179, 23 Pac. 335, the defendant was indicted in the district court of Custer county, May 13,1889, for the crime of rape. On the trial, the defendant objected to the sufficiency of the indictment on the ground that it did not aver that the female was "not the wife of the perpetrator" of the alleged rape. The objection was sustained by the court, and the defendant discharged. The territory reserved the question of law by exception, which appeared in the record, and appealed to the Supreme Court of the territory. At the January term, 1890, of the Supreme Court of the state, the judgment of the lower court was reversed, and the cause remanded with instructions to proceed against the defendant on said judgment.

In the case of *State v. Sullivan,* 9 Mont. 175, 22 Pac. 1088, the defendant was convicted and sentenced for the crime of robbery; the crime is alleged to have taken place about the 10th day of April, 1889. This case was tried and a conviction had thereon, and the defendant sentenced, prior to the admission of the state into the Union. On account of certain instructions given to the jury by the court, said cause was reversed and remanded for a new trial by the Supreme Court of the state.

In the case of the *State v. Thompson,* 10 Mont. 550, 27 Pac. 349, the defendant was charged with the crime of rape. The indictment was found prior to the admission of the state into the Union, alleging that on or about the 12th day of April, A. D.

1889, said crime was committed. Said cause was tried after said state was admitted into the Union, and resulted in a judgment of conviction. At its June term, 1891, the Supreme Court of the state affirmed said cause.

North Dakota: Section 1, Schedule, Const. 1889:

"That no inconvenience may arise from a change of territorial government to a state government, it is declared that all writs, actions, prosecutions, claims and rights of individuals and bodies corporate shall continue as if no change of government had taken place, and all process which may, before the organization of the judicial department under this Constitution be issued under the authority of the territory of Dakota shall be as valid as if issued in the name of the state."

In the case of *Territory of Dakota v. O'Hare,* 1 N. D. 35, 44 N. W. 1003, the defendant, in said territory, on April 24, 1889, prior to the admission of the state into the Union, was convicted of the crime of murder. The Supreme Court of the state reversed the case on account of an instruction given the jury by the trial territorial court, and ordered a new trial.

South Dakota: Section 1, article 26, Schedule, Const. 1889:

"That no inconvenience may arise from the change of the territorial government to the permanent state government, it is hereby declared that all writs, actions, prosecutions, claims, and rights of individuals, and all bodies corporate, shall continue as if no change had taken place in this government; and all process which may be before the organization of the judicial department under this Constitution issued under the authority of the territory of Dakota, within the boundary of this state, shall be as valid as if issued in the name of the state of South Dakota."

In the case of *State v. Leehman,* 2 S. D. 174, 49 N. W. 3, the defendant, in the territory of Dakota, was charged with, on the 11th day of July, 1889, having killed one James H. Burns, and under the state government, after the admission of the state into the Union, was convicted for the crime of murder growing out of said transaction.

Washington: Section 1 (article 27), Schedule, Const. 1889:

"No existing rights, actions, suits, proceedings, contracts or claims shall be affected by a change in the form of government, but all shall continue as if no change had taken place; and all process which may have been issued under the authority of the territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the state."

In the case of *Foster v. Territory of Washington,* 1 Wash. 412, 25 Pac. 459, the accused, by indictment, was charged with the crime of permitting faro to be dealt on his premises, committed about the 12th day of January, 1889, in the county of King in said territory. Prior to the admission of the state into the Union, trial was had on said indictment and said defendant convicted. At the December term, 1890, the Supreme Court of the state affirmed the judgment of the lower court.

In the case of *Freidrich v. Territory of Washington,* 2 Wash. 360, 26 Pac. 976, the accused by indictment, was charged with the crime of murder in the first degree, said crime alleged to have been committed on the 14th day of July, 1887, and thereafter, but prior to the admission of said state into the Union, said accused was tried and a judgment of conviction had. On account of certain exceptions reserved to the instructions of the court to the jury, the Supreme Court reversed said cause and remanded it for a new trial.

In the case of *State of Washington v. Stowe,* 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609, the accused was charged by information with having, on the 5th day of October, 1889, murdered one Enoch Crosby in the city of Tacoma, and after said state was admitted into the Union said accused was tried on said information, which after the admission of the state into the Union had been filed against him, and which was in due form of law, for the murder of said Crosby. Said accused was convicted and sentenced on said conviction. On account of exceptions reserved to the admission of testimony, said cause was reversed by the Supreme Court of the state.

In the case of *Lybarger v. State,* 2 Wash. 553, 27 Pac. 449, 1029, the accused was charged by information, filed by the state's attorney on the 22d day of July, 1890, after admission of the state into the Union, with a justice of the peace of said state, charging said accused with the crime of seduction; and thereafter, on the 6th day of October, 1890, the said prosecuting attorney for Thurston county made and filed with the superior court of Thurston county an information charging said accused with having on the 10th day of January, 1889, committed the crime of seduction. The accused contended that the law changing the mode of procedure from an indictment to an information was an *ex post facto* law and violated his substantial rights. The Supreme Court of the state, at its July term, 1891, affirmed the judgment of the lower court.

In the case of *State v. Freidrich,* 4 Wash. 206, 29, Pac. 1055, 30 Pac. 328, 31 Pac. 332, which had been before the Supreme Court of said state before (2 Wash. 358, 26 Pac 976), the grand jury of King county, after the admission of the state into the Union, returned a new indictment against the said accused charging him with the crime of murder. On the 12th day of September, 1891, appellant was arraigned upon an indictment, and without any other plea or objection entered his plea of not guilty, and the cause was set for trial on September 21st. On September 16th counsel for appellant filed in the cause a lengthy document, objecting to the validity of said indictment, said crime having been committed prior to the admission of said state into the Union. Said accused was convicted, and sentence pronounced thereon. The following is the conclusion of the Supreme Court of said state:

> "The conclusion of the court is that the judgment of death rendered in the superior court be set aside and vacated, but that the verdict of the jury stand, and that the cause be remanded to the superior court of King county, with instructions to enter a new judgment of murder in the second degree against the appellant, and proceed thereon in accordance with the law."

In re Freidrich, 149 U. S. 71, 13 Sup. Ct. 793, 37 L. Ed. 653, this record of conviction was taken before the Supreme Court of the United States, and said court refused to discharge him.

In the case of *Way v. Woolery,* 6 Wash. 158, 32 Pac. 1082, this case arose upon a writ of *habeas corpus* issued by one of the judges of the superior court of King county to examine into the authority of the sheriff to hold the appellant further under his commitment. The contention of the appellant is that, inasmuch as there was nothing in either the enabling act which authorized the organization of the state of Washington, or in the constitution of the state, which in express language authorized this court to remand cases to the superior courts of the state for further proceedings, the superior court had no jurisdiction in this instance, but that if any commitment could be issued by any court it must have been issued by this court. The court said:

"We shall not enter upon any review or discussion of the several portions of the enabling act and the Constitution which operated to transfer causes pending in the Supreme Court of the territory of Washington to the Supreme Court of the state of Washington. They are clear and unmistakable in their language, and the appellant makes no contention that they did not have the effect to give this court jurisdiction to try and determine the former case. The mistake which appellant makes in this matter is found, we think, in that he overlooks the fact that, when this court came into existence and took possession of cases pending in the territorial Supreme Court, it also acquired all the powers of the former territorial court under the statutes of the territory, one of which was to remand cases to the successors of the former territorial district courts, namely, the superior courts, for the execution of its judgments. Therefore, no express language was necessary, either in the enabling act or in the Constitution, to effect that object."

Idaho: Section 1, Schedule, Const. 1889:

"That no inconvenience may arise from a change of the territorial government to a permanent state government, it is declared that all rights, actions, prosecutions, claims, liabilities, and obligations against the territory of Idaho, of whatsoever nature, and rights of individuals, and of bodies corporate, shall continue as if no change had taken place in this government, and all process which may, before the organization of the judicial department under this Constitution, be issued under the authority of the territory of Idaho, shall be as valid as if issued in the name of the state."

In the case of *Territory v. Stoyer,* 3 Hasb. (Idaho) 35, 26 Pac. 166, the defendant was indicted and convicted prior to the admission of the state into the Union. The Supreme Court of the state affirmed the judgment of the lower court.

Wyoming: Section 1 (article 21), Schedule, Const. 1889:

"That no inconvenience may arise from a change of the territorial government to a permanent state government, it is declared that all writs, actions, prosecutions, claims, liabilities and obligations against the territory of Wyoming, of whatever nature, and rights of individuals and of bodies corporate, shall continue as if no change had taken place in this government, and all process which may, before the organization of the judicial department under this Constitution, be issued under authority of the territory of Wyoming, shall be as valid as if issued in the name of the state."

Utah: Section 1, Schedule, Const. 1895.:

"In order that no inconvenience may arise, by reason of the change from a territorial to a state government, it is hereby declared that all writs, actions, prosecutions, judgments, claims, and contracts, as well of individuals as of bodies corporate, both public and private shall continue as if no change had taken place; and all process which may issue, under the authority of the territory of Utah, previous to its admission into the Union, shall be as valid as if issued in the name of the state of Utah."

In the case of *People v. Kessler*, 13 Utah, 69, 44 Pac. 97, the defendant was indicted in the district court of the territory of Utah on the 1st day of December, 1894, and under said indictment on the 19th day of December he was found guilty of murder in the second degree, and on the 2d day of May, 1895, he was sentenced on said verdict; and said cause, after the admission of the state into the Union, was reversed by the Supreme Court at its January term, 1896, on account of errors in the admission of testimony and instructions to the jury, no question being raised as to jurisdiction of the Supreme Court of the state to pass on said cause.

In the case of *State of Utah v. Hayes*, 14 Utah, 119, the defendant, by indictment, was charged with the crime of murder in the first degree in shooting and killing one Albert Enstrom, alias Albert Hayes, of Utah county, February 16, 1895. The verdict of guilty of murder in the first degree was rendered April 21, 1896, and the defendant was sentenced to be hanged by the neck until he was dead, this being a case where the crime was committed and the indictment found prior to the admission of the territory into the Union. The judgment of the lower court sentencing the defendant to be executed was affirmed.

In the case of *People v. Burtleson,* 14 Utah, 259, 47 Pac. 87, the defendant was convicted in the first district court of Utah, prior to the admission of the state into the Union, for the crime of maintaining a nuisance, and the Supreme Court of the state at its October term, 1896, affirmed the conviction.

In the case of *People v. McCune,* 14 Utah, 153, 46 Pac. 658 35 L. R. A. 396, where the defendant was convicted in the Sixth judicial district court of the territory of Utah for befouling a stream, he appealed from said judgment to the Supreme Court of the state, which court at its October term, 1896, affirmed the same.

In the case of *State v. Carrington,* 15 Utah, 483, 50 Pac. 526, the defendant was indicted and convicted of murder in the second degree. The counsel for the prisoner objected to the indictment because it was found by a grand jury of seven members, as provided in section 13, art. 1, Const. of Utah, and claimed that the law authorizing such a jury was *ex post facto* as to this case, because the alleged offense was committed before the Constitution went into effect, and also moved for a change of venue. The court held that it had jurisdiction of said case. The court said: "Nor can we say that the court erred in refusing to grant the motion for a change of venue, under the circumstances disclosed by the record, there being no question as to the jurisdiction of the court to try the cause." The case was reversed and remanded on account of the admission of certain testimony.

In the case of *State v. Thompson,* 15 Utah, 489, 50 Pac. 409, the defendant was indicted for the crime of larceny in May, 1895, tried in Emery county, 1897, before a jury consisting of eight persons, found guilty, and sentenced to imprisonment in the penitentiary. When called upon for sentence his counsel moved to vacate and set aside the verdict, on the ground that the defendant had been tried before eight jurors, when the law in force at the time of the alleged commission of the offense provided that the defendant should be tried by twelve jurors; that the alleged conviction was in violation of the provisions of the Constitution of the United States guaranteeing due process of law; and that the Constitution and laws of Utah providing for trials in criminal cases, not capital, by a jury of eight persons, were as to the offense committed prior to the admission of the state into the Union as a state, in violation of section 10, art. 1, of the Constitution of the United States. The motion was overruled, and the defendant appealed to the Supreme Court of the state, and the judgment of the lower court was affirmed. This case was then taken on a writ of error to the Supreme Court of the United States. In the case of *Thompson v. State of Utah,* 170 U. S. 344, 18 Sup. Ct. 620, 42 L. Ed. 1063, Justice Harlan speaking for the court, said:

> "By an indictment returned in the district court of the Second judicial district in the territory of Utah, at its May term, 1895—that being a court of general jurisdiction—the plaintiff in error and one Jack Moore were charged with the crime of grand larceny alleged to have been committed March 2, 1895, in Wayne county of that territory, by unlawfully and feloniously stealing, taking, and driving away one calf, the property of Heber Wilson. The case was first tried when Utah was a territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a state. At the second trial the defendant was found guilty. He moved for a new trial upon the ground, among others, that the jury that tried him was composed of only eight jurors; whereas, by the law in force at the time of the commission of the alleged offense, a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside and another trial ordered. This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the state prison for a term of three years.

The judgment of conviction was confirmed by the Supreme Court of Utah, the court holding that the trial of the accused by a jury composed of eight persons was consistent with the Constitution of the United States. By the statutes of the territory of Utah in force at the time of the commission of the alleged offense, it was provided that a trial jury in the district court should consist of twelve, and in justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number. * * * "

The Supreme Court of the United States further said:

"In our opinion the provision in the Constitution of Utah, providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because in respect of such crimes the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

In the case of *State v. Bates,* 14 Utah 296, 47 Pac. 78, 43 L. R. A. 33, the defendant was tried upon an indictment charging him with the murder of John Nordquist, the crime having been committed prior to the admission of the state into the Union. The defendant was convicted and sentenced to imprisonment for 10 years. The judgment of the lower court was affirmed.

District of Columbia: When Virginia in 1789 ceded a portion of said territory to the United States government, it provided that jurisdiction of the laws of said commonwealth over individuals residing within the limits of such cession should not cease or determine until Congress, having accepted the cession, should by law provide for the government thereof. Congress (Act July 16, 1790, c. 28, 1 Stat. 130, Act March 3, 1791, c. 17, 1 Stat. 214) adopted such cession, and provided that the operation of the laws of the state within such district should not be affected until Congress should otherwise provide by law. In the case of *United States v. Heinegan,* 1 Cranch (C. C.) 50, 26 Fed. Cas. 253, No. 15,340, an offense committed prior to the consummation of said cession in such territory, against the commonwealth of Virginia, was prosecuted in the United States Circuit Court of the District of Columbia, as an offense against the United States, to final judgment.

There are unquestionably many other state cases of like import, but these are sufficient to show the settled policy of the Congress from 1792, when Kentucky was admitted, until 1896, when Utah joined the Union of states; one unbroken line, acquiesced in without even a protest.

In the case of Florida there is no provision in the Constitution (1838) under which it was admitted for the transfer of cases not of federal nature from the state courts that expressly became the successors of the superior courts of the territory to the federal courts following after statehood. Had thtere been such, it would have unquestionably been held in *Re Benner v. Porter,* 9 How. (U. S.) 235, 13 L. Ed. 119, that when Congress admitted the said state under said Constitution it thereby expressly concurred in such provision. See, also, *Calkin v. Cocke,* 14 How 237, 14 L. Ed. 398.

It is obvious that it has been the universal practice in this republic to prosecute pending criminal cases, not of a federal nature, in the state courts, as the successors of the territorial courts when new states were admitted into the Union where it was so provided in their respective Constitutions. It has remained until the forty-sixth state was admitted before this power was ever questioned in any forum.

It is seriously contended for the first time, so far as we can find, that it is not within the power of Congress to provide that criminal cases, not of federal nature, cognizable before the territorial courts, shall be tried by the state courts as successors of the same, and even though the state concurs in such provision.

In the case of *American &Ocean Insurance Company v. 350 Bales of Cotton,* 1 Pet. (U. S.) 511, 7 L. Ed. 255, Chief Justice Marshall, for the court says:

"On the 2d day of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories.

which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated into the Union of the United States as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyments of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in the political power; they do not share in the government till Florida shall become a state. In the meantime Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers congress 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.' Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state, acquired the means of self government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Which ever may be the source whence the power is derived, the possession of it is unquestioned. * * *

"It has already been stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principal by using these words, 'laws of the territories now in force therein.' No laws could have been in force but those enacted by the Spanish government. If, among these, a law existed on salvage—and it is scarcely possible there should not have been such a law—jurisdiction over cases arising under it was conferred on the superior courts; but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section. * * *

"If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which can not well be misunderstood. The Constitution declares (article 3), that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be under their authority; to all cases affecting ambassadors, or other public ministers, and consuls, and to all cases of admiralty and maritime jurisdiction.' * * *

"It has been contended that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested 'in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.' Hence it has been argued that Congress can not vest admiralty jurisdiction in courts created by the territorial Legislature. We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares 'that judges both of the supreme and inferior courts, shall hold their office during good behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possess over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the *combined powers of the general and of a state government.*"

In the case of *McAlester v. United States,* 141 U. S. 177, 11 Sup. Ct. 949, 35 L. Ed. 695, it is said:

"In view of these and other provisions of that act, it is clear that the District Court for Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of the state of Oregon, so far as they were applicable and not inconsistent with the act and the Constitution and laws of the

United States. But is the court thus established for Alaska one of the 'courts of the United States' within the meaning of section 1768 of the Revised Statutes? If it be, then the President had no authority, by that section, to suspend Judge McAlester, and his claim to salary, up to, at least, the confirmation by the Senate of the nomination of Dawson is well founded. If it be not, then the judge of the Alaska court is not of the class excepted by that section, and being a civil officer, appointed by and with the advise and consent of the Senate, was within the very terms of the clause authorizing his suspension by the President during the recess of the Senate. An affirmative answer to the question just stated could not well be given upon the theory that a territorial court is one of those mentioned in article 3 of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish, the judges of which hold their office during good behavior, receiving at stated times, for their services, a compensation that can not be diminished during their continuance in office, and are removable only by impeachment."

In the case of *Benner v. Porter,* 9 How. (U. S.) 235, 13 L. Ed. 119, the court says: That territories "are legislative governments, and their courts, *legislative* courts, Congress in the exercise of its powers in the organization and government of the territories, *combining the powers of both the federal and state authorities.*" The court further says:

"The territorial courts, therefore, were not courts upon which the judicial power conferred by the Constitution (article 3, § 1) on the federal government could be deposited. They were incapable of receiving, as the tenure of the incumbent was for but four years. *American Ins. Co. v. Canter,* 1 Pet. (U. S.) 546, 7 L. Ed. 256. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of the state."

In the case of *Clinton v. Englebrecht,* 13 Wall. (U. S.) 434, 20 L. Ed. 659, Chief Justice Chase said:

"The Judges of the Supreme Court of the territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the

United States. This was decided long since in *American Ins. Co. v.* 356 *Bales of Cotton,* 1 *Pet.* (U. S.) 546, 7 L. Ed. 256: *Benner v. Porter,* 9 How, (U. S.) 255, 13 L. Ed. 119. There is nothing in the Constitution which would prevent Congress conferring the jurisdiction which they exercise, if the judges were elected by the people of the territory and commissioned by the Governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it hardly can be supposed that the earliest territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period. There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution of the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States."

In the case of *Hornbuckle v. Toombs,* 85 U. S. 648, 21 L. Ed. 966, Justice Bradley says:

"That acts of Congress respecting proceedings in United States courts are concerned with and confined to those courts, considered as parts of the federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over District of Columbia and the territories of the United States."

In the case of *Snow v. United States,* 18 Wall. (U. S.) 319, 21 L. Ed. 784, which involved the question as to whether the United States attorney or the proper territorial attorney should prosecute certain cases in the territory of Utah, the court said:

"Strictly speaking, there is no sovereignty in a territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that the indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. But the practice has been otherwise, not only in Utah, but in other territories organized upon the same type."

In the case of *National Bank v. County of Yankton*, 101 U. S. 162, 168 (25 L. Ed. 1046), the court said:

"All territory within the jurisdiction of the United States not included in any state must necessarly be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations. The organic law of a territory takes the place of a Constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as were expressly or by implication reserved in the prohibitions of the Constitution. In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislature, but it may itself legislate directly for the local government. It may make a void act of the territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments."

To the same effect is the case of *Shively v. Bowlby*, 152 U. S. 1, 48, 14 Sup. Ct. 548, 38 L. Ed. 331, which was brought to the Supreme Court of the United States on a writ of error to the Supreme Court of the state of Oregon. Mr. Justice Gray, in delivering the opinion of the court, said:

"By the Constitution, as is now well settled, the United States, having rightly acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty national and municipal, federal and state, over all the territories, so long as they remain in the territorial condition. *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511

542, 7 L. Ed. 242; *Benner v. Porter,* 9 How. (U. S.) 242, 255, 13 L. Ed. 119; *Cross v. Harrison,* 16 How. (U. S.) 164, 193 (14 L. Ed. 889); *National Bank v. Yankton County,* 101 U. S. 129, 133 (25 L. Ed. 1046); *Murphy v. Ramsey,* 114 U. S. 15, 44, 5 Sup. Ct. 747, 29 L. Ed. 47; *Mormon Church v. United States,* 136 U. S. 1, 42, 43, 10 Sup. Ct. 792, 34 L. Ed. 481; *McAlester v. United States,* 141 U. S. 174, 181, 11 Sup. Ct. 949, 35 L. Ed. 693."

"Congress has absolute power over the territories, and may legislate directly for the government thereof. It is within the powers of Congress to declare crimes and punishments therefor in the territories." (*National Bank v. Yankton,* 101 U. S. 129, 25 L. Ed. 1046; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244.)

"In the territories Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the Legislature of a state might legislate in a state." (*Metropolitan Railroad Co. v. District of Columbia,* 132 U. S. 9, 10 Sup. Ct. 19, 33 L. Ed. 231; *Simms v. Simms,* 175 U. S. 168, 20 Sup. Ct. 58, 44 L. Ed. 115; *U. S. v. McMillan,* 165 U. S. 510, 17 Sup. Ct. 395, 41 L. Ed. 805.)

"Congress may govern the territories either mediately or immediately, either by the creation of a territorial government with power to legislate for the territory, subject to such restrictions and restraints as Congress may impose upon it, or by the passage of laws directly operating upon the territory without the intervention of a subordinate government." (*De Lima v. Bidwell,* 128 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Downes v. Bidwell,* 182 U. S. 244, 45 L. Ed. 1088; *Dorr v. U. S.,* 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128.)

Congress exercises the combined powers of the national and state governments, and in which such powers of Congress are absolute, complete and supreme. *American Ins. Co. v. Canter,* 1 Pet. (U. S.) 511-542, 7 L. Ed. 242; *Case v. Toftus* (C. C.) 39 Fed. 733, 5 L. R. A. 684; *Territory v. Lee,* 2 Mont. 130; *Murphy v. Ramsey,* 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47; *Thompson v. Utah,* 170 U. S. 374, 18 Sup. Ct. 620, 42 L. Ed. 1061; *White v. Berry,* 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; *United States v. Coe,* 155 U. S. 85, 15 Sup. Ct. 16, 39 L. Ed. 76; *Hunt v. Palo,* 4 How. (U. S.) 589, 11 L. Ed. 1115; *Webster v. Reid,* 11

How. (U. S.) 437, 13 L. Ed. 761; *Freeborn v. Smith,* 2 Wall. (U. S.) 160, 17 L. Ed. 922; *Express Co. v. Kountze,* 8 Wall. (U. S.) 349, 19 L. Ed. 457; *In re Wilson,* 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513.

By an act of Congress of Mar. 2, 1890, the Attorney General of the United States was directed to institute a suit in equity in the Supreme Court of the United States against the state of Texas, setting forth the title and claim of the United States to a certain tract of land designated on the map of Texas as Greer county. Suit was thereafter instituted in the Supreme Court by the Attorney General of the United States, in accordance with the provisions of this act, to determine such question. The case was decided on March 16, 1896 (*United States v. Texas,* 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867), the court holding that Greer county, Tex., was not within the limits or under the jurisdiction of that state, but subject to the exclusive jurisdiction of the United States of America. Section 2 of an act of Congress relating to Greer county (Act May 4, 1896, c. 155, 29 Stat. 114), provides:

"That all proceedings and actions of every kind, in or before the several courts and officers of Greer county, Texas, shall have the same force and effect as if said courts and officers had been legally authorized courts and officers of the United States or of the territory of Oklahoma, and the courts of said territory having jurisdiction of similar matters shall make and issue all orders and writs necessary to enforce the orders, decrees, and final judgments of said courts and officers of Texas."

Section 3 provides:

"That all suits which are pending in the several courts of said Greer county, Texas, on March sixteenth, eighteen hundred and ninety-six, as shown by the dockets thereof, shall be entered upon the dockets of the courts of Oklahoma having jurisdiction of like cases, and the same shall proceed as if they had been brought in said courts of Oklahoma. Where an appeal or writ of error has been taken by any of said courts of Greer county, Texas, to any other court of Texas, the judgment of said appellate court shall be binding upon all parties to such case, and upon the filing of a certified copy thereof in the court of Oklahoma having jurisdiction of like cases, it shall be the duty of such court to enter the same upon its minutes and proceed in said action in all respects as though it had rendered the original judgment therein. All rights in the cases mentioned in this section shall be determined by the law of Texas applicable to the act or transaction involved, and the court shall take judicial notice of such law for the purpose. When any judgment affirmed by any such appellate court provides for imprisonment, such imprisonment shall be in such place as the proper court of Oklahoma shall designate."

It will be observed in that act Congress provided that all cases which were pending in the several courts of Greer county, Tex., should be entered upon the dockets of the courts of Oklahoma having jurisdiction of like cases, and that the same should be proceeded with as if they had been brought in said courts of Oklahoma. All criminal proceedings pending in Greer county, Tex., had been instituted by the state of Texas and were pending in the courts of that state, and in all other respects were proceedings which had been instituted under the laws of. Texas. Congress transfered those cases to the territory of Oklahoma to be prosecuted by the proper county officers of Greer county, Okla., a territory of the United States. Strictly speaking, Greer county was never a part of the state of Texas, but it certainly cannot be a question that the state of Texas, with a *de jure* government. maintained a *de facto* government in Greer county. Its courts were constituted in the same manner provided by the laws of the state of Texas, and authorized by legislative enactments. The control of Texas in domestic and local affairs was supreme and undisturbed. It had every attribute, and performed every function, of a *de jure* government. Up to the time of the decisions of the Supreme Court of the United States, the state of Texas, a *de jure* government, exercised an undisturbed sovereignty and jurisdiction over Greer county, and while this power was exercised without right, it constituted a *de facto* government, executive, legislative, and judicial, and all the acts of its officers and courts, not in contravention of any rights under the laws of the Constitution of the United States, were valid and binding. The act of Congress transferred all cases instituted and pending under the laws and in the courts of one sovereignty to the courts of another sovereignty, to be there proceeded with as if they had been brought originally in the courts of the soveriegnty to which they were transferred. In that case there was an exercise of sovereignty by one of the states of the Union over territory which did not belong to it, and while the governments and courts in Greer county, Tex., were merely *de facto* and not *de jure,* at the same time could it be said that the transfer of the criminal cases which had been previously instituted and which were pending in the courts of Texas was not a transfer of cases from one sovereignty to another?

The only case which has drawn in question the validity of the act of Congress was that of *Cullins et al. v. Overton, Sheriff, et al.,* 7 Okla. 470, 54 Pac. 702 ,in which it was held that the act was in all respects within its constitutional powers.

There can be no doubt as to the power of Congress to make such provisions in respect to criminal cases, although of a local character and not of a federal nature, unless the defendant is entitled by some provision of the federal Constitution to have his case prosecuted to a final determination in the United States court in that territory. As between the territory of Oklahoma and the Indian Territory there is one difference: In Oklahoma Congress had created the territorial government as an agency through which the power of Congress with respect to the prosecution of offenses of a local character was exercised. Congress in the Indian Territory, exercised its paramount power of legislation directly instead of indirectly. There has not been a uniformity in the government and control of the territories by the Congress of the United States. The following are examples:

Arkansas: Under an act of Congress approved March 2, 1819, c. 49, 3 Stat. 493, Arkansas was organized into a territorial form of government, and section 5 of said act reads as follows:

"That, the legislature shall, until the organization of the General Assembly hereinafter provided for, be vested in the Governor and judges of the superior courts of the territory who shall have power to pass any law for the administration of justice in said territory which shall not be repugnant to this act or inconsistent with the Constitution of the United States: Provided, whenever the general assembly shall be organized all the legislative powers shall be vested in and exercised by said General Assembly."

California: The state of California was brought within the limits of the United States by the treaty of Guadalupe Hidalgo. concluded February 22, 1848, and proclaimed July 4, 1848. It was governed by the commanding officer of the military force stationed there acting as provisional governor. There was never any organized form of territorial government. General Riley, U. S. A., the provisional governor, without any action on the part of Congress, called a convention which framed a Constitution and submitted the same to the people for ratification, and on November 13, 1849, same was ratified, and afterwards, to wit, on September 9, 1850, Congress passed an act for the admission of California into the Union. On September 28, 1850, a subsequent act of Congress provides that all laws of the United States, which were not locally inapplicable, should have the same force and effect within the state of California as elsewhere in the United States.

Florida: An act of Congress, approved March 30, 1822, c. 13, 3 Stat. 654. organized Florida into a territorial form of government. Section 5 of said act provides that the legislative power shall be vested in a governor and in thirteen of the most fit and discreet persons of the territory, to be called the "Legislative Council" who shall be appointed annually by the President of the United States, by and with the advice and consent of the Senate, from among the citizens of the United States residing there. The Governor, by and with the advice and consent of said Legislative Council, or a majority of them, shall have power to alter, modify, or repeal the laws which may be in force at the commencement of this act. Their legislative powers shall also extend to all rightful subjects of legislation, but no law shall be valid which is inconsistent with the Constitution and laws of the United States, or which shall lay any person under restraint, burthen or disability on account of his religious principals, all of which he shall be free to maintain not burdened with those of another.

Louisiana: On March 3, 1805, Congress passed an act organizing Louisiana into a territorial form of government (chapter 31, 2 Stat. 331). Section 3 of said act provides that the legislative power shall be vested in a Governor and in three judges, or a majority of them, who shall have power to establish inferior courts in the said territory and prescribe their jurisdiction, and to make all laws which they deem conducive to the good government of the inhabitants thereof: Provided, however, that no law shall be valid which is inconsistent with the Constitution and laws of the United States, or which shall lay any person under restraint or disability on account of his religious opinions, profession, or worship, in all of which he shall be free to maintain his own and not be burdened with those of another: And provided also, that in all criminal prosecutions the trial shall be by a jury of twelve good and lawful men, and in all civil cases of the value of $100, the trial shall be by jury if either of the parties require it.

Missouri: By act of Congress of June 4, 1812, c, 95, 2 Stat. 743, Missouri was organized into a territorial government, and section 4 of said act provides that the legislative power should be vested in a General Assembly, which should consist of the Governor, the Legislative Council, the House of Representatives; and section 5 further provides that the Legislative Council should consist of nine members, to continue in office five years, unless sooner removed by the President of the United States, and five of them should be a quorum. The Legislative Council should be nominated and appointed in the manner following: As soon as representatives should be elected they should be confirmed by the Governor, and when said Legislative Assembly meets they should nominate 18 persons, residents in said territory, one year preceding their nomination, holding no office of profit under the territory or of the United States, the office of justice of the peace excepted, and each possessing in his own right 200 acres of land therein, and return the names to the President of the United

States, nine of whom the President, by and with the advice and consent of the Senate, should appoint and commission to serve as aforesaid, and when a vacancy should occur in the Legislative Council by death or removal from office, the House of Representatives should nominate two persons qualified as aforesaid, and return their names to the President of the United States, one of whom he should, by and with the advice and consent of the Senate, appoint and commission for the residue of the term and every five years thereafter in like manner the President should appoint the successors or members of said council.

In the Constitutions of the states under which said territories were admitted into the Union were contained provisions for the continuance of all prosecutions. Unless it was so clear and evident as to reach a moral certainty that Congress did not have the power expressly or by reasonable implication, after a century of acquiescence in same, when new states were admitted into the Union, to provide for the state to assume jurisdiction of cases of a local nature arising under the territorial government, this court will not at this late date declare such provisions to be void. But what provision in the federal Constitution gives the defendant the right to demand to be tried in a federal tribunal for an offense committed under the territorial form of government, after it has ceased to exist? We have been cited to none.

The sixth amendment to the federal Constitution is as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *state* and *district* wherein the crime shall have been committed, which district shall have *previously been ascertained* by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

The only clause in this provision which might be made the subject of argument on the constitutional question is the clause, "which district shall * * * have been previously ascertained by law," and under the decision of the Supreme Court of the United States this provision would not be applicable in a case such as we have under consideration. The Supreme Court has held repeatedly that the sixth amendment applies only to the case of offenses against the laws of the United States committed within the limits of a state, and does not apply to those offenses committed within one of the territories of the United States.

In the case of *United States v. Dawson,* 15 How. (U. S.) 467, 14 L. Ed. 775, an indictment had been returned in the Circuit Court of the United States for the district of Arkansas, charging murder in the Indian Territory west of the state of Arkansas. A motion was made on behalf of the defendant to quash the indictment, and one of the points urged by the counsel for the defendant was the jurisdiction of the court in which the case was being tried. The judges being divided in opinion concerning certain questions of law, the case came before the Supreme Court of the United States upon a certificate of division. Mr. Justice Nelson, in delivering the opinion of the court, in referring to the sixth amendment to the Constitution, said:

"It has been supposed that a provision in the sixth amendment to the Constitution of the United States has a bearing upon this question, which provides that 'in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' The argument is that, since the erection of the new district out of the nine western counties in the state together with the Indian country, it is not competent for the cir--cuit court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed and the trial is to be had must be ascertained and fixed previous to the commission of the offense."

In the case of *Jones v. United States,* 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, which was an indictment for murder, the Supreme Court, in refering to the sixth amendment, said:

"By the Constitution of the United States, while a crime committed within any state must be tried in that state and in a district previously ascertained by law, yet a crime not committed within any state of this Union may be tried at such place as Congress may by law have directed."

And in the case of *Cook v. United States,* 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906, the Supreme Court, in considering this provision of the Constitution, held to the same effect.

It will be observed by the above cases that the sixth amendment does not apply in any case where a proceeding is instituted outside of the jurisdiction of a state for a violation of the laws of the United States. The question is settled by abundant authorities. The power of Congress to designate the place of trial of criminal cases, regardless of the sixth amendment, outside of the jurisdiction of a state, cannot be successfully attacked.

Oklahoma: Section 14, Enabling Act:

"That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable with the district in which committed, and all prosecutions for crimes and offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed." (Act June 16, 1906, c. 3335. 34 Stat. 275.)

In the argument of this case there were quite a contrariety of constructions suggested as to this section, but in view of the sixth amendment to the Constitution, as construed by the Supreme Court of the United States, the intention of Congress was quite evident. Congress provided for the erection of a state out of Oklahoma and Indian Territories, and created two judicial districts. and in providing that crimes that were committed after statehood, of a federal nature, should be cognizable within a previously ascertained district in which the crime was committed, at the same time provided that such cases of a federal nature committed prior to statehood should in like manner be tried.

In the United States courts of an unorganized territory—all being legislative courts created by the same powers—crimes of a local character are practically the same as those committed in an organized territory; for as appears in *Snow v. U. S., supra,* with strict propriety such crimes are against the peace and dignity of the United States, although the indictment alleges "against the peace and dignity of the people of the territory." If such a case can be prosecuted in a state court as sucessor of such court under the organized territory, why not in like manner as successor of a court of like character under the government of the unorganized territory? The alleged distinction is certainly of no moment when we are considering the constitutional power of Congress in admitting a new state to provide for proper succession of courts, and as to actions and prosecutions, so as to prevent any interval or hiatus between the old and new systems.

Further, when a territoral government is created, and courts are established by means of legislation through acts of Congress, the United States Congress does not relinquish dominion or sovereignty over such territory, so far as the prosecutions of crimes of a local nature or character are concerned, but an agency is thereby ocreated through which its powers may be exercised. If all crimes committed within a territory are committed against the government and peace and dignity of the United States, as has been said in the case of *Snow v. United States,* 18 Wall. (U. S.) 319, 21 L. Ed. 784, *supra,* what material difference is there, so far as the constitutional power of Congress is concerned, with respect to the transfer of pending cases, whether they are pending in the territorial courts of an organized territory or in the United States courts of an unorganized territory?

Section 16 of the enabling act, as amended March 4, 1907 (chapter 2911, pt. 1, 34 Stat. 1286), so far as it relates to district court cases, is as follows:

> "Prosecutions for all crimes offenses committed within the territory of Oklahoma or in the Indian Territory, pending in the district courts of the territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such territories as a state, which, had they been *committed within a state, would have been cognizable in the federal courts,* shall be transferred to and be proceeded with in the United States Circuit or District Court established by this act for the district in which the

offenses were committed in the same manner and with the same effect as if they had been committed within a state."

The test is to be made by applying the hypothetical existence of a state to a region that was specifically a territory and subject to special laws as such.

Section 39 of the enabling act under which Oklahoma was admitted, but relating solely to Arizona and New Mexico is as follows:

"That in respect to all cases, proceedings, and matters now pending in the supreme court or district courts of the said territories at the time of the admission into the Union of the said state, and arising within the limits of such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of the said territories respectively; and in respect to all cases, proceedings, and matters pending in the supreme or district courts of the said territories at the time of the admission of such territories into the Union, arising within the limits of said state, the courts established by such state shall, respectively be the successors of said supreme and district territorial courts; and all the files, records, indictments and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the state shall be pending, in any territorial court in said territories shall abate by the admission of such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be: Provided, however, that in all civil actions, causes and proceedings, in which the United States is not a party transfers shall not be made to the Circuit and District Courts of the United States except on cause shown by written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts." (Act June 16, 1906, c. 3335, 34 Stat. 284.)

In the case of *Moore v. United States*, 85 Fed. 470, 29 C. C. A. 274, the court says:

"There are some acts which Congress may by law designate as a crime against the general government or against the operations of government which effect every citizen, whether of a state or territory; such as treason, illegally holding office, violations of the postal laws, false impersonation in procuring naturalization, presenting false claims against the government, etc. The federal laws defining these and kindred offenses operate upon all citizens of the United States, and that they reside in a state constitutes no exemption from a prosecution for a violation thereof in the courts of the United States, for jurisdiction is expressly conferred by statute upon the federal courts. As applied to criminal laws, it is the laws of the United States that the enabling act declares shall have the same force and effect within the state of Utah as elsewhere within the United States; and it is prosecutions for violations thereof which, under the provisions of that act, are not to abate upon the admission of the state by reason of any change in the courts, but are to be transferred from the territorial district court, a court having jurisdiction in such cases during the existence of a territorial form of government, to the circuit and district courts, courts having jurisdiction in such cases after admission of the state. That the provisions of the enabling act were so understood and construed by the Constitutional convention is evidenced by the fact that in the schedule (annexed to the Constitution) providing for the transfer of causes to the federal courts it provides only for those cases whereof the United States Circuit Court and District Courts might have had jurisdiction had there been a state government at the time of the commencement thereof, and this is not such a case."

Apparently it was the intention of the Congress in using the language in section 16 of the enabling act, as amended, in reference to pending cases in Oklahoma and Indian Territory, different to that in section 39 of the same act relating to such cases in New Mexico and Arizona, two organized territories, to recognize the existing conditions of an organized and unorganized territory being admitted as one state into the Union. And obviously the Congress intended to vest in the federal courts the continued prosecution of criminal cases of a federal character, and to continue in the state courts the prosecutions of a local or municipal character.

Applying this test to a county embraced within the former Indian Territory, which had never been erected into an organized territory with a legislative assembly, but where all the governmental legislation therefor was directly enacted by the Congress, it was not intended that pending criminal cases should be transferred to the federal courts merely because they all involved an offense under an act of Congress. For the last clause of section 20, as amended, is as follows:

> "All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be prosecuted to final determination in the state courts of Oklahoma under the laws now in force in that territory."

The distinction reasonably appears to be the same as that recognized in reference to organized territories, in which the territorial courts sitting as United States courts have cognizance of laws of the United States, and as territorial courts laws of the territory or of a local nature. *Ex parte Gen-shav-ee,* 130 U. S. 343, 9 Sup. Ct. 542, 32 L. Ed. 973; *United States v. Pridgeon,* 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

We conclude that prosecutions of offenses which are of such a character that the federal jurisdiction does not depend upon the fact of their having been committed within a territory, but, even should the territory have been erected into a state previous to the commission of the offense, would have still been cognizable in the federal courts, and that such previous prosecutions as were based upon an enactment relating particularly to Indian Territory or to territories generally are to be considered as laws relating to the local government, and are not to be transferred to the federal courts, but are to be prosecuted to final determination in the state courts as successors of the territorial courts of Oklahoma Territory or of the United States courts of the Indian Territory in their local capacity. Further, however, prosecutions under any federal statute, which were not contingent on the fact that the country was formerly a territory, but established a general law relating to crime against the United States of which a federal court would have had jurisdiction even had the crime been committed within a state, and not within a territory, are to be transferred to the federal courts.

In the case of *Koenigsberger v. Richmond Silver Mining Company,* 158 U. S. 41, 48, 15 Sup. Ct. 751, 39 L. Ed., 889. which was an action at law commenced in the district court of the First judicial district of the territory of Dakota, the Supreme Court of the United States, in passing upon the question of the admission of a territory as a state and the disposition of pending cases, said:

> "So long as a territory of the United States remains in the territoral condition, and the United States have entire dominion and sovereignty over it, national and municipal, there is ordinarly no occasion to distinguish how far the subjects committed by Congress to the courts of the territory are not of a federal character. *American Inc. Co. v. Canter,* 1 Pet. (U. S.) 511, 546, 7 L. Ed. 242; *Benner v. Porter,* 9 How. (U. S.) 235, 242, 243, 13 L. Ed. 119. But when a territory is admitted into the Union as a state, upon the same footing as all the other states, the territorial government and courts cease to exist, and matters of national cognizance remain within the power and jurisdiction of the nation, but other matters come under the power and jurisdiction of the state; and then it becomes important to distinguish, as to pending suits, whether they are of a federal or a municipal character, and to provide by law that those of the first class should proceed in the courts of the United States and those of the second class in the courts of the new state. The courts of the United States inferior to this court having no jurisdiction except as conferred by Congress, congressional legislation is necessary to enable those courts, after the admission of the state into the Union, to take jurisdiction of cases previously commenced in the courts of the territory, and not yet finally adjudged. And such legislation has been so construed and expounded by this court as to give effect, as far as possible, consistently with its terms and with the Constitution of the United States, to the apparent intention of Congress to vest in the courts of the United States the jurisdiction of such cases, so far as they are of a federal character, either because of their arising under the Constitution and laws of the United States, or because of their being between citizens of different states. *Freeborn v. Smith,* 2 Wall. (U. S.) 160, 17 L. Ed. 922; *Express Co. v. Kountze,* 8 Wall. (U. S.) 342, 350, 351, 19 L. Ed. 457; *Baker v. Morton,* 12 Wall. (U. S.) 150, 153, 20 L. Ed. 262. See also, *United States v. Lynde*

et al. (C. C.) 44 Fed. 215 and *Bates v. Payson,* 4 Dill. (U. S.) 265, Fed. Cas. No. 1,103."

Section 33 of the act of May 2, 1890, c. 182, 26 Stat. 81, is as follows:

"That the provisions of chapter forty-five of the general laws of Arkansas, entitled 'Criminal Law,' except as to the crimes and misdemeanor mentioned in the provisos to this section, and the provisions of chapter forty-six of the said general laws of Arkansas, entitled 'Criminal Procedure,' as far as they are applicable, are hereby extended over and put in force in the Indian Territory, and jurisdiction to enforce said provisions is hereby conferred on the United States courts therein: Provided, that in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to such offenses: And provided further that the United States Circuit and District Courts, respectively, for the Western District of Arkansas, and the Eastern District of Texas, respectively, shall continue to exercise exclusive jurisdiction as now provided by law in the Indian Territory as defined in this act, and in their respective districts as heretofore established, over all crimes and misdemeanors against the laws of the United States applicable to the said territory, which are punishable by said laws of the United States by death or by imprisonment at hard labor, except as otherwise provided in the following sections of this act."

Section 31 of the same act as follows: ,

That certain general laws of the state of Arkansas in force at the close of the session of the General Assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide. * * *

"The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations shall have the same *force* and *effect* in the *Indian Territory* as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

Section 4 of the act of March 1, 1895, c. 145, 28 Stat. 693, in part reads as follows:

"* * * The provisions of chapter forty-five of Mansfield's Digest of the General Laws of Arkansas, entitled 'Criminal Law,' except as to crimes and misdemeanors mentioned in the proviso of this section, and chapter forty-five of said Laws of Arkansas, contained in said digest, entitled 'Criminal Procedure,' and chapter ninety-one of said General Laws, regulating the jurisdiction and procedure before justices of the peace in civil cases, be, and they are hereby, extended and put in force in the Indian Territory; and the jurisdiction to enforce said provisions is hereby conferred upon the United States court in the Indian Territory: Provided, that in all cases where the *laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to said offenses,* except for the crime of larceny, the punishment for which shall be that prescribed by the laws of the state of Arkansas, any law in force in said territory to the contrary notwithstanding. * * *"

Section 9 of the same act is in part as follows:

"That the United States court in the Indian Territory shall have exclusive original jurisdiction of all offenses committed in said territory, of which the United States court in the Indian Territory now has jurisdiction, and after the 1st day of September, eighteen hundred and ninety-six, shall have original exclusive jurisdiction of all offenses against the laws of the United States, committed in said territory, except such cases as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, shall have acquired jurisdiction of before that time; and shall have such original jurisdiction of civil cases as is now vested in the United States court in the Indian Territory and appellate jurisdiction in all cases tried before said commissioners, acting as justices of the peace where the amount of the judgment exceeds twenty dollars. * * *"

The Attorney General of the United States on December 20, 1907, in a communication to the United States attorney for the Eastern District of Oklahoma relative to the Robert Thompson Case, which was pending on indictment for murder in the United State court for the Central District of the Indian Territory at South McAlester at the time of the admission of the state into the Union, said:

"By section 31 of the act of May 2, 1890, c. 182, 26 Stat. 81, it was specially provided that 'all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States.' While it is not entirely clear that under this statute it was intended to extend these laws to all parts of the territory as distinct from those places of exclusive federal jurisdiction, such as military or Indian reservations, to which they would have extended even within a state, it would in any event appear that, in so far as the jurisdiction of the federal court depended solely on the fact that the offense was committed within the territory, it would not have been cognizable in a federal court if committed within a state or if this particular territory had been a state when the offense was committed, but would be an offense coming within a local law for the government of the territories, the prosecution of which should be continued in the state courts after the admission of such territories as a state. I am, therefore, inclined to the view, expressed in Judge Campbell's opinion in the Thompson Case, that jurisdiction did not pass to the federal court, if, as appears in your letter, the indictment was based solely upon section 5339 of the Revised Statutes (U. S. Comp. St. 1901, p. 3627).

We conclude that Congress intended, in providing for the transferring of cases pending in the territorial courts of Oklahoma and the United States courts of the Indian Territory at the time of the admission of the state into the Union, that each should be considered as if a state government existed at the time of the commission of the alleged offenses, and if in that condition it would have been cognizable in the federal courts, then the same should be transferred to such courts, otherwise to be prosecuted to a final

determination in the state courts. *United States v. McBratney,* 104 U. S. 621, 26 L. Ed. 869; *Moore v. United States,* 85, Fed. 465 29 C. C. A. 269; *United States v. Kagama,* 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 230; *Ward v. United States,* 28 Fed. Cas. 397, No. 16,639; *Ward v. Race Horse,* 163 U. S. 505, 16 Sup. Ct. 1076, 41 L. Ed. 244; *United States v. Baily,* 24 Fed. Cas. 937, No. 14,495; *State v. Doxtater,* 47 Wis. 278, 2 N. W. 439; *Draper v United States,* 164 U. S. 248, 17 Sup. Ct. 107, 41 L. Ed. 419.

By section 4 of the act of March 1, 1895, c. 145, 28 Stat. 693, the criminal laws of Arkansas, with the proviso that in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for punishment of the same offenses the laws of the United States shall govern as to said offenses, except for the crime of larceny, the punishment for which shall be that prescribed by the laws of the state of Arkansas, were extended to and put in force entirely over the Indian Territory.

Said section 4 is virtually a re-enactment of section 33 of May 2, 1890, c. 182, 26 Stat. 96, with the exception of the proviso in said section 33 to the effect that the United States Circuit and District Courts, respectively, for the Western District of Arkansas and the Eastern District of Texas, respectively, should continue to exercise their exclusive jurisdiction as then provided by law in the Indian Territory as defined in that act over all crimes and misdemeanors against the laws of the United States applicable to said territory which were punishable by said laws of the United States by death or imprisonment at hard labor, etc.

By section 9, Act March 1, 1895, *supra,* it was provided that the United States courts of the Indian Territory should have jurisdiction of such offenses, except as to cases of which the federal courts at Paris, Tex., Ft. Scott, Kan., and Ft. Smith, Ark., had before September 1, 1906, acquired jurisdiction. It is clear that said section 5339 of the Revised Statutes of the United States for the crime of murder was intended to be put in force over the Indian Territory entirely, and particularly over its entire area without regard as to whether it was a fort or an Indian reservation. Had it been treated as an entire Indian reservation, said laws as to murder, etc., would have been in force over same by virtue of section 2145, Revised Statutes of the United States, and, should the Indian title of any reservation become extinguished, such laws then extended over same by virtue of said section 2145, *supra,* would have become inoperative as to such area. However, said section 5339, by the act of May 2, 1890, *supra,* was put in force over the entire Indian Territory regardless of whether it was a fort or an Indian reservation, and under no contingency could it become inoperative in its effect. *Bates v. Clark,* 95 U. S. 204, 24 L. Ed. 471; *Buster v. Wright,* 135 Fed. 947, 68 C. C. A. 505.

On May 2, 1890, the laws of the United States, by virtue of section 2145 of the Revised Statutes, were in force in all forts, Indian reservations, and places of such exclusive jurisdiction in the Indian Territory, and section 31 of the said act extended to and put in force the Constitution and all the laws of the United States throughout the Indian Territory, and thereafter sections 4 and 9 of the act of March 1, 1895, are virtual re-enactments of sections 31 and 33 of said Act of May 2, 1890, Congress thereby utilizing both the laws of the United States and certain laws of Arkansas to regulate and control, specially and mediately and directly, local conditions therein. *Ex parte Larkin,* 1 Okla. 53, 25 Pac. 745, 11 L. R. A. 418; *Ex parte Pridgeon,* 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *Cherokee Tobacco Co. v. United States,* 78 U. S. 624, 20 L. Ed. 228.

Then, again by adopting the literal meaning of the words, "prosecutions for all crimes and offenses committed within the territory or in the Indian Territory, pending * * * in the United States courts in the Indian Territory upon the admission of such territories as a state, *had they been committed within a state,* would have been cognizable in the federal courts, shall be transferred to and proceeded with in the United States Circuit or District Court established by this act, * * * in the same manner and in the same effect as if they had been committed within a state"—the same conclusion as to jurisdiction is reached. *Wing v. Chicago & N. Y. Ry. Co.,* 1 S. D. 458, 47 N. W. 530; *Dorne v.*

Richmond Silver Mining Co., 1 S. D. 21, 44 N. W. 1021.

In the case of *United States v. McBratney,* 104 U. S. 621, 26 L. Ed. 869, *supra,* the court says:

"But the act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorized the inhabitants of the territory to form for themselves out of said territory a state government, with the name of the 'State of Colorado,' which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever; and the act contains no exceptions of the Utes Reservation, or of jurisdiction over it. 18 Stat. pt. 3, p. 474. The provision of section 1 of the subsequent act of June 26, 1876, c. 147 (19 Stat. 61) that upon the admission of the state of Colorado into the Union, the laws of the United States, not locally inapplicable, shall have the same force and effect within the state as elsewhere within the United States, does not create any such exception. Such a provision has a less extensive effect within the limits of one of the states of the Union than in one of the territories of which the United States have sole and exclusive jurisdiction."

The act of March 3, 1875, necessarly repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. *Cherokee Tobacco Co. v. United States,* 11 Wall. (U. S.) 616, 20 L. Ed.227. Whenever upon the admission of a state into the Union, Congress has intended to accept out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express word. *The Kansas Indians,* 5 Wall. (U. S.), 737, 18 L. Ed. 667; *United States v. Ward, supra.*

"The state of Colorado, by its admission into the Union by Congress upon an equal footing with the original states in all respects whatever, without any such exceptions as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have therefore no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offenses committed by white men against white men. It follows that the Circuit Court of the United States for the District of Colorado has no jurisdiction of this indictment, but according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the state of Colorado to be dealt with according to law. *United States v. Cisna,* 1 McLean, 254 265, Fed. Cas. No. 14,795; *Coleman v. Tennessee,* 97 U. S. 509, 519, 24 L. Ed. 1118."

In the case of *Draper v. United States,* 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419, the court says:

"The assertion of jurisdiction in the courts of the united States over the crime of murder perpetrated by one not an Indian against one not an Indian is based on the fact that the offense was committed on an Indian reservation. The contention as to want of jurisdiction rests upon the proposition that, the Indian reservation being within the state, the courts of the state had alone cognizance of crimes therein done by others than Indians. To determine these conflicting contentions requires a brief examination of the legislation organizing the territory of Montana and which provided for the admission of the state into the Union.

"The territory of Montana was organized by the act of May 26, 1864, c. 95, 13 Stat. 85. Subsequently, in 1868, the Crow Indian reservation was created (15 Stat. 649), the land of which it was composed being wholly situated within the geographical boundaries of the territory of Montana. The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land embraced within the reservation, in any state or territory then existing or which might thereafter be created. The law to enable Montana and other states to be admitted into the Union was passed February 22, 1889, 25 Stat. 676, c. 180. This act embraced the usual provisions for a convention to frame a Constitution, for the adoption of an ordinance directed to contain specified agreements, and provided that, upon the compliance with the ordained requirements, and the proclamation of the President so announcing, the state should be admitted on an equal footing with the original states. The question then is , has the state of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indian or against Indians, or did the enabling act deprive the courts of the state of such jurisdiction of all offenses committed on the Crow Indian Reservation, thereby divesting the stat *pro tanto* of equal authority and jurisdiction over its citizens, usually enjoyed by the other states of the Union?

"*United States v. McBratney* is therefore decisive of the question now before us, unless the enabling act of the state of Montana contained provisions taking that state out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the state by virtue of its admission into the Union. Such exception is sought here to be evolved from certain provisions of the enabling act of Montana which were ratified by an ordinance of the convention which framed the Constitution of the State. The provision relied on is as follows:

" 'Second. That the people inhabiting the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state of Montana shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein or in the ordinances herein provided for shall preclude the said state of Montana from taxing as other lands are taxed any land owned or held by an Indian who has severed his tribal relations and has obtained from the United States , or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of Congress may prescribe.'

"The words in the foregoing provisions upon which the argument is based are the following: 'And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.' This language has been considered in several cases in the courts of the United States with somewhat contradictory results. *United States v. Ewing* (D. C.) 47 Fed. 809; *United States v. Partello* (C. C.) 48 Fed. 670; *Truscott v. Hurlburt Land & Cattle Co.*, 73 Fed. 60, 19 C. C. A. 374.

"As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians. It is argued that as the first portion of the section in which the language relied on is found disclaims all right and title of the state to 'the unappropriated public lands lying within the boundaries thereof and of all lands lying within said limits, owned or held by an Indian or Indian tribes, and until the title thereof shall be extinguished by the United States, the same shall be and remain subject to the jurisdiction of the United States,' therefore the subsequent words 'and said lands shall remain under the absolute jurisdiction and control of the United States' are rendered purely tautological and meaningless, unless they signify something more than the reservation of authority of the United States over the lands themselves and the title thereto. This argument overlooks not only the particular action of Congress, as to the Crow Reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the union.

"On April 11, 1882, c, 74, 22 Stat. 42, Congress confirmed an agreement submitted by the Crow Indians for the sale of a portion of their reservation, and for the survey and division in severalty of the agricultural lands remaining in the reservation as thus reduced. The act, however, provided that the title to be acquired by the allottees was not be be subject to alienation, lease or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order, or decree of any court, but should remain inalienable and be not subject to taxation for the period of twenty-five years, and until such time thereafter as the President might see fit to remove the restriction.

"The policy thus applied to the Crow reservation subsequently became the general method adopted by Congress to deal with Indian reservations. In February, 1887, by a general law, Congress provided 'for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and foi other purposes.' Act Feb. 8, 1887, c. 119, 24 Stat. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided, in section 6, 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside. But the act the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be allotted. Moreover, by section 4 of the act of 1887, Indians not residing on a reservation, or for whose tribe no reservation had been provided, were empowered to enter a designated quantity of unappropriated public land and to have patents therefor, the right, however, of such Indian to sell or incumber being regulated by provisions like those controlling allotments in severalty of lands comprised within a reservation. From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselvs would hav passd under the authority and control of the state.

"It is also equally clear that the reservation of jurisdiction and control over the Indian lands was relevant to and is explicable by the provisions of section 4 of the act of 1887, which allowed nonreservation Indians to enter on and take patents for a certain designated quantity of public land. Indeed, if the meaning of the words which reserved jurisdiction and control over Indian lands contended for by the defendant in error were true, then the state of Montana would not only be deprived of authority to punish offenses committed by her own citizens upon Indian reservations, but also would have like want of authority for all offenses committed by her own citizens upon such portion of the public domain, within her borders, as may have been appropriated and patented to an Indian under the terms of the act of 1887. The conclusion to which the contention leads is an efficent demonstration of its fallacy. It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the state of Montana was admitted into the Union adequatly explains the use of the words relied upon, and demonstrates that in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians, and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless unless it be construed as depriving the state of authority to it belonging in virtue of its existence as an equal member of the Union.'

Section 4, par. 2, of the Montana enabling act, Act Feb. 22, 1889, c. 180, 25 Stat. 676, is substantially the same in effect as the proviso in section 1 of the Oklahoma enabling act which reads as follows:

"Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

The only other reservation as to jurisdiction in the Oklahoma enabling act is contained in the proviso of section 7 to wit:

"Provided, that nothing in this act contained shall repeal or affect any act of Congress relating to the Sulphur Springs Reservation as now defined or as may be hereafter defined or extended, or the power of the Unitd States over it or any other lands embraced in the state hereafter set aside by Congress as a national park, game preserve, or for the preservation of objects of archaeological interest; and nothing contained in this act shall interfere with the rights and ownership of the United States in any land hereafter set aside by Congress as national park, game preserve, or other reservation, or in the said Sulphur Springs Reservation, as it now is or may hereafter be defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso, contained shall be construed to prevent the service within said Sulphur Springs Reservation or national parks, game preserves, and other reservations hereafter established by law, of civil and criminal processes lawfully issued by the authority of said state, and said state shall not be entitled to select indemnity school lands for the thirteenth, sixteenth, thirty-third, and thirty-sixth sections that may be embraced within the metes and bounds of the national park, game preserve, and other reservation or the said Sulphur Springs Reservation, as now defined or may hereafter be defined."

By the same process of reasoning followed by the Supreme Court of the United States in cases of *United States v. McBratney, supra,* and *Draper v. United States, supra,* we conclude that the Congress, upon the admission of Oklahoma as a state, where it has intended to except out of such state an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. It is not contended that the alleged crime was committed on any such excepted reservation, or in any place where the United States has the sole and exclusive jurisdiction since the admission of the state. Now, mark you the language, "had they been committed within a state would have been cognizable in the federal courts," contained in section 16, as amended March 4, 1907, of the Oklahoma enabling act. Does not that mean in a state similarly circumstanced as one with enabling act like ours? When you consider this language in connection with section 39 of the same enabling act pertaining to Arizona and New Mexico, *supra,* it seems that Congress was recognizing the existing conditions and the bringing in of an organized and unorganized territory as one state, and that it was laying down the rule that if such offense had been committed after the admission of the state it would have been cognizable in the federal court, that then such Federal court would have jurisdiction; otherwise not. Any other conclusion can be reached only by reasoning against the apparent and reasonable literal mean-

ing. See, also, the following authorities heretofore cited: *Moore v. United States,* 85 Fed. 465, 29 C. C. A. 269; *United States v. Kagama,* 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 230; *Ward v. United States,* 28 Fed. Cas. 397, No. 16,639; *Ward v. Race Horse,* 163 U. S. 505, 16 Sup. Ct. 1076, 41 L. Ed. 244; *United States v.Baily,* 24 Fed. Cas. 937, No. 14,495; *State v. Doxtater,* 47 Wis. 278, 2 N. W. 439.

We necessarily conclude that the district court of the county of the state in which the offense was committed has jurisdiction of this offense.

In this case the United States Judge for the Eastern District held that the state court had jurisdiction of this prosecution, not the federal court, and directed the marshal to deliver the prisoner to the proper state authorities, and the respondent sheriff, acting under the instructions of his co-respondent, refused to receive him. Whereupon the respondent district judge refused to take jurisdiction of said cause or to make any order relative thereto. The said court should have taken jurisdiction.

A writ of mandamus is subject to the legal and equitable discretion of the court, and ought not to be issued in cases of doubtful right. But it is the only adequate mode of relief where an inferior tribunal refuses to act upon the subject properly before it. *Life Ins. Co. of N. Y. v. Heirs of Wilson,* 8 Pet. (U. S.) 291, 8 L. Ed. 949. There is no remedy for refusal to assume jurisdiction in this case except mandamus. The writ will be awarded, to be issued only on the further application of relator's counsel, if an order taking jurisdiction of said cause is not made in the court below upon advice of our conclusions.

All the Justices concur.

Ex Parte GRIMES *et al.*

No. 67. Opinion Filed March 12, 1908.

(94 Pac. 668.)

1. **INJUNCTION—Restraining Order Distinguished—Bond.** The fact that a bond is required by the court and given by the party applying for a restraining order at the time of its issuance will not have the effect of changing the same to a temporary injunction. It is the better practice to require bond in all such cases.

2. **SAME—Contempt—Violation of Restraining Order—Expiration of Order.** Where a restraining order fixes a day certain for the parties against whom it is secured to appear and show cause why a temporary injunction should not issue, and at the time thus fixed neither the parties nor the court take any action, the order thereby spends its force and is of no further validity, and a judgment holding a party in contempt for the violation of its terms is void, and he is entitled to be released on **habeas corpus.**

3. **SAME—Revival of Order.** Where a restraining order has spent its force by reason of no action taken on the day set to show cause, the belief of the parties to the suit that it is still effective and a motion filed by defendants for its vacation will not revive it for or against either of them.

4. **SAME—"Until Further Orders of this Court."** The words, "Until the further orders of this court," contained in a restraining order in conjunction with a day set for a hearing on which parties are required to show cause, if any, why a temporary injunction should not issue against them, have no other or further meaning than "in the meantime." Any other construction would be inconsistent with the very object of the requirement to show cause.

(Syllabus by the Court.)

Application of Lewis C. Grimes and L. C. Grimes, Jr. for a writ of *habeas corpus.* Writ granted.

On April 11, 1905, on petition and affidavits duly filed in the office of the clerk of the district court of Oklahoma county, Hon. B. F. Burwell, judge of said court, granted an order, entitled "Restraining Order" against Lewis C. Grimes and L. C. Grimes, Jr., *et al.,* which was in words and figures as follows, to wit:

"Now on this 11th day of April, 1905, the above entitled matter comes on to be heard before the undersigned, B. F. Burwell, judge of the above-entitled court, the said plaintiff appearing by his attorneys, J. H. Everest and C. F. Smith, and the court having examined the petition duly verified by the plaintiff and the supplementary affidavit sworn to by said plaintiff and filed herein, finds that said petition and affidavit has been duly filed in the office of the clerk of this court, and that said petition and affidavit show the said plaintiff to be entitled to a temporary restraining order, pending the hearing upon the application for a temporary injunction herein, upon the execution of a good and sufficient bond in the sum of one thousand dollars, to be approved by the clerk of this court and filed with said clerk.

"It is therefore ordered by the court that the said defendants, Lewis C. Grimes, L. C. Grimes, Jr., Frank Curry and Roe Curry, and each of them, are hereby forbidden and restrained from going upon, trespassing upon, or in any way interfering with the said plaintiff in the use and possession of the land described in said plaintiff's petition, to wit, the east one-half (E.½) of the northwest quarter (N. W. ¼), and the west half (W. ½) of the northwest quarter (N. W. ¼), and the west one-half (W. ½) of the northeast quarter (N. E. ¼), all in section twenty-four (24), township twelve (12) north, of range (1) east, in Oklahoma county, territory of Oklahoma, until the further orders of this court, and that the hearing upon the application of said plaintiff for a temporary order herein be and hereby is set for April 22, 1905, at 9 o'clock a. m., before the above-entitled court, at Oklahoma City, said county and territory, and the said Lewis C. Grimes is hereby restrained and forbidden either by himself or through his agents,servants, employes, tenants and any and all other persons acting by, through, or under his authority, from plowing up and cultivating any portion of said lands, or from destroying or harvesting any of the crops now growing on said lands, and from in any way interfering with the plaintiff Levi J. Pipher, in the quiet use and enjoyment of the said lands and premises until the further orders of this court or the judge thereof, and the hearing upon said application for a temporary injunction herein, provided, however, that this order shall not take effect until said plaintiff shall have executed and filed with the clerk of this court a good and sufficient bond with sureties, to be approved by the clerk of this court, in the sum of one thousand & no-100 dollars. conditioned that he will pay to the said defendants any and all damages which they may sustain if this order shall have been wrongfully obtained and issued.

"And the said defendants and each of them are hereby commanded to appear before the undersigned judge of the above-entitled court at 9 o'clock a. m. of the 22nd day of April, 1905,

and then and there show cause, if any, why a temporary injunction shall not issue herein against them, pending the final hearing and disposition of this cause. B. F. BURWELL,
"Judge, Third Judicial District."

The bond given as required by the order was approved by the clerk, but at the time, the 22d day of April, 1905, when the hearing was ordered to take place as provided for in the order, no action of any kind was taken by the parties or the court. On the 21st day of June, 1905, the defendants filed a verified motion and answer to vacate and set aside and declare for naught the said restraining order. Reply was filed in this case, but no further action was taken until on January 7, 1908, when the plaintiff Levi J. Pipher, filed his affidavit in the office of the clerk of the district court of Oklahoma county setting up a violation of the restraining order, and Hon. George W. Clark, judge of the district court of Oklahoma County, issued an order to Lewis C. Grimes, and L. C. Grimes, Jr., citing them to appear before him on the 10th day of January, 1908, or as soon as counsel could be heard to show cause, if any, why they should not be punished for contempt by reason of their disregard and violation of the order of the court above set out. On this citation, such things were had and done and such action taken that on the 8th day of February, 1908, the said court,Hon. Joseph G. Lowe, presiding judge, entered judgment against the said parties holding them guilty of contempt, and committing them to the custody of the sheriff of Oklahoma county until a fine assessed and the costs of the proceeding were paid, and until they made restitution of the premises in question, and made bond in the sum of one thousand dollars ($1,000) to obey the restraining order which they were charged with violating.

J. M. Adams, Jr., and *Blakeney & Maxey,* for petitioners.

Chas. J. West, W. C. Reeves, J. H. Everest, and *C. F. Smith,* for respondent.

DUNN, J. (after stating the facts as above). This cause is before us on application for writ of *habeas corpus,* the parties claiming their right to discharge, and alleging, among other things, that, "at the time designated in the restraining order, these defendants had appeared by counsel in the district court of Oklahoma county at place designated in Oklahoma City, therein, but that no further order was made in the said action, and that no temporary injunction was ever issued, and that said restraining order had become inoperative and was of no force and effect and had expired," and hence that the judgment of the court issued therein was a nullity and void. The respondent in this case takes the position that the order granted by Judge Burwell on the 11th day of April, 1905, for the violation of which the petitioners are held in contempt, was a valid, existing order of injunction in January, 1908, at the time of the alleged violation. The petitioners, on the other hand, base their claim to a writ of *habeas corpus* and to release upon the proposition, as above stated, that the order was a mere restraining order, whose force was spent and expired on no action being taken on the 22d day of April, 1905, when they were cited to show cause, if any, why a temporary injunction should not issue against them. These two contentions make necessary the scrutinizing of the law as well as the order to determine its force and effect.

Section 4425, of Wilson's Revised & Annotated Statutes of Oklahoma for 1903, under the subject "Injunction," reads as follows:

"When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing ,or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act."

Under the terms of this statute a temporary injunction may be granted without notice to the parties on whom it is to operate. This section, however, must be read in conjunction with section 4429, Wilson's Rev. & Ann. St. 1903, which provides that "no injunction, unless otherwise provided by special statute, shall operate until the party obta the same shall give an undertaking." The other paragraph, under the subject of "Injunction," requiring consideration by virtue of this order, is section 4427, Wilson's Rev. & Ann. St. 1903, which reads as follows:

> "If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may in the meantime restrain such party."

Under which of these statutes was this order issued? Undoubtedly the temporary injunction mentioned in section 4425 is a writ of higher character than the restraining order mentioned in section 4427, for a writ issued under the former would be of no force, validity, or effect except on the execution of a bond by the parties securing the same, while no such rule seems to be specifically required by the statute in the latter case. The former embodies a restraint which continues, unless modified by the court, until the hearing of the cause, and then it is made either permanent or discharged altogether; while the latter, strictly speaking, is, not an injunction at all, but a writ of the court to compel parties to maintain the matters in controversy in *statu quo* until the question of whether or not a temporary injunction ought to issue may be determined. No bond is, by the statute, required on the issuance of a temporary restraining order, although many authorities hold that it is better practice to require it.

> "According to the statutes of some of the states, a temporary restraining order may be granted pending the order to show cause, without requiring bond of the plaintiff; but it is always the better practice to require a bond." (10 Ency. P. & P. p. 1016, and cases cited.)

See, also, *Neumann and Neumann v. Moretti,* 146 Cal. 31, 79 Pac. 512; *Prader v. Purkett et al.,* 13 Cal. 588.

From these authorties it will be observed that the fact that a bond may be required or is given will not in itself change the character of a restraining order to that of a temporary injunction;

indeed, in a great majority of cases, the bond seems to have been required and given.

Under the terms of the statute, the court may direct a reasonable notice to be given to the party against whom an injunction is sought, and may in the meantime restrain him; and this either with or without a bond in its discretion, and in either event the character of the order remains the same. The question which now presents itself is, what effect will the restraining order have after the day on which the court cites the parties to appear to show cause why a temporary injunction should not be issued, when neither of them appears on that day and no further action of any kind or character is taken? The authorities seem to be reasonably uniform upon the question, and all sustain with apparent unbroken regularity the holding that it dies, and has no force and validity after that date, even though neither of the parties nor the court take any action.

> "A restraining order is an order granted to maintain the subject of controversy in *statu quo* until the hearing of an application for a temporary injunction. It may be issued before notice to defendant in order to prevent irreparable injury pending the hearing Its purpose is merely to suspend proceedings until there may be an opportunity to inquire whether any injunction should be granted, and it is not intended as an injunction *pendente lite*; hence its duration should be limited to such a reasonable time as may be necessary to notify the adverse party, especially where defendant is likely to be damaged by delay. A restraining order ceases to be operative at the expiration of the time fixed by its terms; or if at the time fixed by it to show cause there is no appearance by either party, and the motion for injunction is not continued or kept alive in any mode, although there is no order of dissolution, and although the restraining order provides that it shall be effective until further order." (22 Cyc. p. 745.)

In a case from Utah, *Miles v. Sheep Rock Mining & Milling Company*, 15 Utah 436, 49 Pac. 536, the court issued a restraining order against the collection of an assessment levied on certain stock. A day was fixed allowing the parties to show cause why a temporary injunction should not be granted, and the court, in considering the facts in connection with the restraining order, says:

"If upon the date so fixed there is no appearance of the parties, and no continuance of the hearing on the motion for the injunction, the restraining order falls with the motion, and the restraint upon the collection of the assessment is at an end. Under such circumstances it requires no order of court to dissolve the restraining order. Its life ceases with that of the motion, for such an order is not intended as an injunction *pendente lite,* and is not an injunction within the meaning of the provision of the statute above quoted."

The statute of Utah relating to temporary restraining orders is practically the same as that of Oklahoma, and is as follows:

"If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained." (2 Comp. Laws Utah, 1888, § 3304.)

The case of *State of Nebraska ex rel. George H. Downing, v. Greene, Dist. Judge,* 48 Neb. 327, 67 N. W. 162, was an original application for writ of mandamus in the Supreme Court of the state of Nebraska to compel the respondent, as judge of the Twelfth judicial district, to fix the amount of a supersedeas bond to be given by relator, who had bought out the laundry business of one Lewis *et al.* under the agreement that they would not again engage in such business. On a violation of this contract, relator sought to enjoin them, and secured from the county judge a restraining order, who set the hearing thereon for a day certain. Bond was required and given as in the case at bar. The statutes of Nebraska relating to temporary injunctions and restraining orders are precisely the same as the statutes of Oklahoma. In the consideration of the case, the court said:

"Clearly no temporary injunction was granted by the county judge. He merely issued an order restraining the defendants from conducting the laundry business until the application for a temporary injunction could be heard by the district court or the judge thereof, and fixed a time for such hearing. No such hearing was had at the time designated, and therefore the restraining order by its own limitation ceased to have any binding force and effect, and could not be revived and continued in force by the giving of a supersedeas bond."

The case of *San Diego Water Company v. Pacific Coast Steamship Company,* 101 Cal. 216, 35 Pac. 651, was an action upon an undertaking given in a suit by the steamship company against the plaintiff, and upon which the individual defendants were sureties. In that case a restraining order was obtained in support of which the bond was executed. A day was fixed on which the parties were cited to show cause why a temporary injunction should not be issued. No appearance was made, and the court said:

> "This order contained a clause restraining the defendant 'pending this order to show cause and until the further order of this court.' There was no appearance by either party at the time the order to show cause was returnable nor was the motion for an injunction continued or kept alive in any mode. The restraining order, therefore, which is only authorized to be made pending the motion, fell with the motion. Code Civ. Proc. § 530; *Hicks v. Michael,* 15 Cal. 107. In the last case Judge Field says that an order dissolving such a restraining order is not necessary. It ends naturally with the motion."

From these authorities it will be observed that in a case where the order issued comes within the provision of the statute governing a restraining order, and nothing is done on the day set for the hearing to continue or keep it alive in any way, it then becomes a nullity and of no force and validity to restrain the party in any particular, and, as Judge Field says, "an order dissolving it is not necessary. It ends naturally with the motion."

It being seen from the authorities above cited that the giving of a bond will not change the character of a restraining order into that of a temporary injunction, and that such restraining order is of force and effect only until the date set for the hearing, we now come to the question of whether or not there was in the order granted in this case anything which created of it a temporary injunction, thereby taking it out of the rule governing restraining orders. If not, the fact that the relators filed a motion to dissolve and believed it to be operative will not have force to create an injunction where none would have existed otherwise. This, however, is the contention of respondent, and he relies to sustain it upon the proposition that the order contained the following language:

> "It is therefore ordered by the court that the said defendants Lewis C. Grimes and L. C. Grimes, Jr., * * * and each of them, are hereby forbidden and restrained from going upon, trespassing upon, or in any way interfering with the said plaintiff in the use and possession of the land described in said plaintiff's petition, to wit: * * * *until the further orders of this court,* * * * and the said Lewis C. Grimes is hereby restrained, etc., * * * from in any way interfering with the plaintiff Levi J. Pipher in the quiet use and enjoyment of said lands and premises *until the further orders of this court or the judge thereof,* and the hearing upon said application for a temporary injunction."

The question now arises, independent of any other recitals in said order, what is the effect of the language contained therein, to wit, "until the further orders of this court," and the further phrase, "until the further orders of this court or the judge thereof"? Do those provisions create of this order a temporary injunction, or is such language restricted and limited in its scope by the inherent character of the order itself?

The case of *Hicks v. Michael,* 15 Cal. 107, was one wherein the county judge issued a restraining order which on the day set for the hearing thereof was set aside, and the plaintiffs asked for a supersedeas to hold the restraining order in effect until the trial of the cause. This suspensive appeal bond, as it was called, was denied, and this case was brought to compel the judge to allow such bond. Chief Justice Field, in delivering the opinion, says:

> "Upon the complaint in this cause, application was made for an injunction. The county judge, to whom the application was made, issued an order upon the defendants, returnable on the 29th of October, to show cause why an injunction should not issue as prayed for, and restraining them from the commission of the acts which are the subject of complaint, 'until the hearing of the whole matter.' The hearing upon the order was continued until the 8th of December, when by the consent of the parties, it was brought

on before the district judge, who, after argument, refused the injunction, and dissolved the restraining order. * * * The restraining order expired by its own limitation. It was issued under the provisions of the one hundred and sixteenth section of the practice act, and was intended only as a restraint upon the defendants until the propriety of granting the provisional remedy of a temporary injunction could be determined, after hearing the parties. The concluding words of the order do not operate to change it into an injunction pending the suit. They only refer to the whole matter on the motion, and not to the whole matter in controversy. The construction insisted upon by counsel is inconsistent with the very object of the requirement to show cause. The direction of the district judge that the restraining order be dissolved was unnecessary, and was probably inserted out of abundant caution."

Section 16 of the practice act referred to is very similar to our statute on restraining orders, and is as follows:

"If the court or judge deem it proper that the defendant or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained."

It will be noted that the same language is contained in the statute—"in the meantime"—as is used in our own statute. The order issued in this case did not contain the language of the order in the case at bar "until the further orders of this court." but contained the language, as above set out, "until the hearing of the whole matter." As is seen, it is contended that this language changed the restraining order into a temporary injunction pending suit, just as is contended in the case at bar that the language, "until the further orders of this court," changed this restraining order into a temporary injunction, and the court in that case, as might well be said in this one, said "the construction insisted upon by counsel is inconsistent with the very object of the requirement to show cause."

In another case from California, *Curtiss v. Bachman,* 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111, wherein it was sought to recover damages sustained by virtue of a temporary injunction issued in a prior suit, the restraining order contained the same language as the restraining order in the case at bar, to wit, that the defendant be restrained "until the further orders of this court." The court construes this language in the following quotation:

> "When the plaintiff, at the commencement of the action, applied for the injunction, the court deemed it proper that the defendant should be heard before granting the writ, and made an order to that effect. Upon this application, the judge was authorized to restrain the defendant 'in the meantime.' Code Civ. Proc. § 530. The provision in the order restraining the defendant 'until the further order of the court' had no other meaning than 'in the meantime,' or until the decision upon the order to show cause. *Sweet v. Mowry*, 71 Hun. 381, 25 N. Y. Supp. 32."

An inspection of the case cited in support of the decision just quoted, *Sweet v. Mowry*, 71 Hun. 381, 25 N. Y. Supp. 32, discloses that the restraining order granted in that case likewise contained the language "until the further order of the court," and in construing it the court held that it had no other meaning or force than is allowed in the language "until the hearing and decision of the application," which is equivalent to the language of our statute "in the meantime." To render the matter clearer, we quote the following from the decision of the court:

> "When the application for an injunction was first made, the judge had the right to deny it until notice of the application was given the defendants, or he might then grant an order requiring them to show cause why such injunction should not be granted. Whichever course he took, he had the right to then 'enjoin the defendants until the hearing and decision of the application.' Code Civ. Proc. § 699. In this case, he made an order to show cause, and enjoined the defendants until the further order of the court. * * * Although the order made June 7th, in terms, is to continue 'until the further order of the court,' we give it no other meaning or greater force than is allowed it by section 609—that is, 'until the hearing and decision of the application'—and therefore we say that when such decision was made, whichever way it might be, an order would be made that would supersede the restraining order already granted."

It is the fundamental inherent difference in the character of relief granted in a restraining order from that granted in a temporary injunction which causes the courts, notwithstanding the fact that the order contains provisions similar to "until the further orders of this court," and like clauses, to adhere to the restraining character of the order and deny it the force and vigor of an injunction. For, as is said in the case of *San Diego Water Co. v. Pacific Coast Steamship Company, supra*:

> "The restraining order is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction, but discriminates between it and an injuction. It is a restraint pending the consideration of the court as to whether the party is entitled to a preliminary injunction."

The distinction is made clear and marked in a Nebraska case, *State of Nebraska ex rel. Plattsmouth Telephone Co. v. Baker,* 62 Neb. 840, 88 N. W. 124. The Nebraska statutes on injunctions and restraining orders as above noted are precisely the same as the Oklahoma statutes on the same subjects, and the court, in drawing the distinction between a restraining order and a temporary injunction under these statutes, speaks in such clear, comprehensive language as to leave no further doubt in the case at bar:

> "By section 253, it is provided that: 'If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may, in the meantime, restrain such party.' This section is not difficult of construction. When it is deemed proper that the defendants shall have notice of the application and be so heard before the injunction is granted, the judge may so direct and in the meantime restrain the party from doing the things complained of. By referring to the order heretofore set out, it will be noticed that the judge found the petition sufficient to grant a temporary order of injunction, and on consideration of the petition alone the order was issued. The order does not by its terms indicate or contemplate that a further hearing on the application was to be had before the application was finally acted upon; and herein, in our judgment, lies the chief distinguishing characteristics between a 'temporary order of injunction' and a mere 'restraining order.' * *

* The difference in the office and purposes of a temporary order of injunction and of a restraining order pending a hearing on the application for an injunction is well defined by statute, and there should be no room for doubt as to which is issued at the beginning of the action. If a further hearing is deemed advisable, this may very easily be expressed in unmistakable terms, and the temporary restraining order could only be regarded as issued for the purpose of restraint until the contemplated hearing was had. Each of the two writs has certain well-defined characteristics which distinguish the one from the other, and there ought to be no reason or opportunity for confusion as to which was intended to be issued."

See, also, *San Diego Water Co. v. Pacific Coast Steamship Co., supra; Houghton, Trustee, v. George B. Cortelyou, Postmaster General* (decided Jan. 20, 1908) 208 U. S. 149, 28 Sup. Ct. 234, 52 L. Ed.—

In addition to the observations above made showing the limitations placed by the courts upon such language as "until the further orders of this court." etc., contained in restraining orders in which this language is held equivalent to "in the meantime," and in addition to the observation of the Nebraska court in which it holds that "the chief distinguishing characteristics between a temporary order of injunction and a mere restraining order" depends upon the question of whether or not the order appears in itself to be a finality or whether there is to be a future hearing to determine whether or not an injunction *pendenre lite* shall be issued, we call attention to the statement of the court in the order under consideration "that said petition and affidavit show the said plaintiff to be entitled to a temporary restraining order pending the hearing upon the application for a temporary injunction herein," which in connection with the authorities above collated makes clear in our minds the correctness of our conclusion that the order issued was merely a restraining order and expired by limitation on the 22d day of April, 1905, the time when the parties were cited to appear and show cause, if any, why a temporary injunction should not issue against them.

The writ of *habeas corpus* is awarded, and the prisoners ordered released from custody under the commitment by which they are now held, with their costs.

All the Justices concur.

Ex parte BAILEY.

No. 42. Opinion Filed March 18, 1908.

(94 Pac. 553.)

JURISDICTION—Venue—No Prosecution before Statehood. An indictment for the crime of murder returned after the admission of the state into the Union for an offense committed under the territory of Oklahoma, where no prosecution whatever had been begun before said date, is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application by Annie Bailey for writ of *habeas corpus*. Writ denied.

On the 16th day or January, 1908, the relator herein was apprehended by G. W. Harrison, sheriff of Oklahoma county, upon a bench warrant issued by virtue of an indictment returned against her on the same date by the grand jury of Oklahoma county, state of Oklahoma, charging that on the 27th day of August, A. D. 1907, the said relator, Annie Bailey, and Judge Peters, did then and there unlawfully, purposely, willfully, feloniously, and with malice aforethought, and without authority of law, and with a premeditated design then existing in the minds of the said defendents, and each of them, to effect the death of one Lillian Ray, with certain drugs and deadly poisons, the kind and character of said poisons being unknown to the grand jury, then and there given and administered by the said defendants, Annie Bailey and Judge Peters, to the said Lillian Ray, make an assault upon the said Lillian Ray, with the unlawful and felonious intent on the part of the said defendants, and each of them, then and there to take the life of her, the said Lillian Ray, and they, the said defendants, Annie Bailey and Judge Peters, did then and there, by administering said poisons aforesaid, unlawfully, purposely, willfully, knowingly, and feloniously poison her, the said Lillian Ray, from the effects of said poisons she, the said Lillian Ray, did languish, and languishing, did then and there die, on the 27th day of August, 1907, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the then territory of Oklahoma, now state of Oklahoma. The venue was also alleged to have been in said county.

On the 2d day of January, 1908, the relator filed in this court her petition for writ of *habeas corpus,* alleging that she was unlawfully restrained by said sheriff of her liberty; further alleging that the offense for which she stood indicted was committed, if at all, on the 27th day of August, 1907, in Oklahoma county, territory of Oklahoma; that no affidavit, information, indictment, warrant, or process of any character whatsoever had been filed or issued against her or any other person charging her or them with the commission of such offense prior to the returning into said district court of said Oklahoma county said indictment; that no rights, actions, suits, proceedings, contracts, or claims existed or were pending up to the time of the returning into court of said indictment whereby or whereunder this said defendant was or could of right be charged with said offense; further alleging that the government of the United States of America had not given its consent to the state of Oklahoma or any consent whereby or whereunder she could be indicted or prosecuted by and under the authority of the state of Oklahoma for the said act, if committed, and, further, that the said state of Oklahoma had not consented to receive and had not accepted or assumed the jurisdiction or right to so prosecute her for such acts as alleged in said indictment, the same being committed under the jurisdiction of the laws of the United States and of the territory of Oklahoma, and, further, that the grand jury of said county, state, and district had no jurisdiction to prosecute said action nor to investigate the said acts or return and present an indictment therefor.

A writ of *habeas corpus* was properly issued on said petition on the 22d day of January, A. D. 1908, and made returnable on the 25th day of said month, and service on said writ being acknowledged and accepted by the said G. W. Garrison as sheriff of said court on the 23d day of January, 1908, and the said sheriff made return showing that he held said relator in his custody as such sheriff by virtue of a bench warrant issued on said indictment hereinbefore referred to and detained her in the jail of said county under a commitment issued by said court. The relator demurred to said return.

H. L. Bolen and Fulton, Jenkins & Spencer, for relator.

Charles West, Atty. Gen., and *W. C. Reeves,* for respondent.

WILLIAMS, C. J. (after stating the facts as above). We have decided at this term of court in the case of *Higgins v. Brown,* reported in this volume, 94 Pac. 703, that section 20 of the enabling act (34 Stat. pt. 1, p. 277, c. 3325), as amended March 4, 1907 (34 Stat. p. 287, c. 2911), having been concurred in by virtue of the provisions contained in sections 27 and 28 of the Schedule of the Constitution, vested jurisdiction of all criminal cases, not of a federal character, pending at the time of the admission of the state into the Union in the territorial courts of Oklahoma and in the United States courts in the Indian Territory, in the state courts of Oklahoma. Now, the question is presented as to whether or not a prosecution for a criminal offense committed in that part of the state formerly known as Oklahoma Territory prior to the admission of the state into the Union, where no prosecution whatever had been begun thereon, not even a complaint or information having been filed against the accused prior to said date, can be instituted in the state courts afterwards, and prosecuted to a final judgment.

Section 1 of the Schedule of the Constitution provides that "no existing *rights, actions,* suits, proceedings, contracts, or claims shall be *affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place.*" Section 2 of the Schedule, *supra,* further provides "that all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law." As was stated in the case of *Higgins v. Brown, supra,* into every Constitution of the states admitted into the Union since 1791 similar provisions to those of sections 1 and 2 of the Schedule, *supra,* have been incorporated without any concurrence of the federal government, except by implication by acts of Congress, there being no prior enabling act admitting such state or states into the Union, or by express or reasonable implication in the enabling act, offenses, not of a federal character, committed under the territorial government heretofore have been originally instituted after the admission of the state into the Union, and prosecuted to a final determination in the state courts.

The states of Nevada, Colorado, Montana, North Dakota, South Dakota, Washington, and Utah were admitted under enabling acts similar to that of Oklahoma, and wherein no express provision was made for nonpending cases; but in their respective Constitutions practically the same language as that in the Constitution of this state is used for the continuance of rights, actions, and prosecutions just as if there had been no change in the form of government from a territory to a state. Sections 1 and 2 of the Schedule of the Constitution of Washington are almost identically, word for word, the same as sections 1 and 2 of the Schedule of the Constitution of Oklahoma. In the former state offenses not of a federal character committed prior to the admission of the state first instituted after such time were prosecuted to final determination in the state courts as successors of the territorial courts. *State v. Stowe,* 3 Wash. St. 206, 28 Pac. 337, 14 L. R. A. 609; *Lybarger v. State,* 2 Wash. St. 553, 27 Pac. 449 1020; *State v. Freidrich,* 4 Wash. 206, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *Freidrich v. Territory,* 2 Wash. St. 358, 26 Pac. 976; *Ex parte Freidrich,* 149 U. S. 79, 13 Sup. Ct. 793, 37 L. Ed. 653; *Way v. Woolery,* 6 Wash. 158, 32 Pac. 1082; *Foster v. Territory,* 1 *Wash.* St. 412, 25 Pac. 459. States with similar enabling acts and substantially like provisions in their Constitution have prosecuted such offenses to final determination in their judicial tribunals. *Wilson v. People,* 3 Colo. 325; *Packer v. People,* 8 Colo. 362, 8 Pac. 564; *State v. Carrington,* 15 Utah 488, 50 Pac. 526: *Higgins v. Brown et al., supra.* The word "right" is defined in Webster's International Dictionary as "that which one has a legal or social claim to do or exact; legal power; authority, as a sheriff has a right to arrest a criminal; that which justly belongs to one; that which one has a claim to possess or own; the interest or share which anyone has in a piece of property; title; claim; interest; ownership." The same authority defines "action" as "a suit or process by which a demand is made of a right in a court of justice; in a broad sense a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; a right of action, as the law gives an 'action' for every claim."

It will be observed that the Supreme Court of the United States in *Benner v. Porter,* 9 How. (U. S.) 247, 13 L. Ed. 119, stresses the fact that the acts of Congress in the several instances of the admission of a state provide for the transfer of the federal causes to the district court, as in the case of Florida, nothing being said at the time in respect to those belonging to state authority, and the court added that such an omission "may very well imply an assent to the transfer of them by the state to the appropriate tribunal"—and adding that "even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication; and a subsequent assent would doubtless operate upon past acts of transfer by the state authority." Mr. Justice Nelson. speaking for the court , says:

"We have said that the assent of Congress was essential to the authorized transfer of the records of the territorial courts, in suits pending at the time of the change of government, to the custody of state tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion on the question whether or not, without such assent, the state judicatures would acquire such jurisdiction. That is altogether a different question. And, besides, the acts of Congress that have been passed in several instances, on the admission of a state, providing for the transfer of federal causes to the district court, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well imply an assent to the transfer of them by the state to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication; and a subsequent assent would, doubtless, operate upon past acts of transfer by the state authority."

In Re Hastings v. Johnson, 2 Nev. 190, the court in referring to the foregoing excerpt from the case of *Benner v. Porter, supra*, said:

"Now, the Constitution of Nevada provides for the transfer of all pending cases from the territorial to the state courts. Congress receives that state into the Union, and admits her representatives under said constitution without objection. Congress makes no provision for these pending causes, nor any provision for the records of the late territorial courts. Here it appears to us is such tacit assent to the action of the state authorities as the court seems to intimate would be sufficient. It is true the records of the late territorial courts belong to the general government. Congress has the power to do what it pleases with them. It might order them to be removed to Washington City. This might create trouble and inconvenience; but we do not think it affects the question of power. The state may, as long as the records of the territorial courts are within her territory and control, use those records as the foundation of civil proceedings to determine the rights of the citizens of its own courts. If Congress should remove these records or restrain their use by the state courts, some law to substitute copies, or some other remedial statute, would have to be passed by the state courts."

In Re Inerarity, Adm'r v. Curtis and Griswold, Trustees, 4 Fla. 183, the court says:

"There is, we think, much force in this view of the question as to causes pending of which the courts of the United States have not exclusive jurisdiction, or cannot, under the Constitution and laws of the United States, take jurisdiction at all; and where, as in the case of Florida, the act of February 22, 1847 (9 Stat. p. 28, c. 17), provides for the transfer of the records and proceedings of certain classes of cases, saying nothing about other classes of which the state courts could take jurisdiction, the inference is irresistible that Congress intended that the state authorities should assume jurisdiction over the latter, or if they had already assumed it, the omission may well be considered as a tacit acquiescence in, and a ratification of, the authority thus claimed and exercised, and in view of the difficulties and confusion which would otherwise arise, in case of a hasty or improvident assumption of authority over the subject by the new state, we should be so inclined to consider the question. Concurring as we do in the opinion expressed by the Supreme Court of the United States in the cases referred to, we feel no hesitation in declaring that the courts of the territory of Florida were courts of the United States, and the records of said courts the records of that government; that the state authorities had no just right to assume the exercise of any authority of jurisdiction over them, except so far as the government of the United States, by express authority of just implication, shall accord the power to do so. So far as Congress, by the act of February 22, 1847, claimed to exercise jurisdiction over certain classes of records and pending causes, it is in our opinion the exercise of a rightful power, and the courts to which the jurisdiction and authority over them is granted are entitled to the custody, and, so far as Congress has not claimed these records, it may be considered as the sanction of the general government to the exercise of jurisdiction by the state authorities over the subject.'

In Re Carter v. Bennett, 4 Fla. 331, the court says:

"We have shown that, so far as the state Legislature was competent to give it, the circuit court had full authority to hear and determine the case. Had it the sanction of Congress. which we have admitted was necessary to the legal transfer of the records and proceedigs therein? The act of Congress of February 22, 1847, was designated to transfer to the United States District Court organized in Florida all such records of the late territorial courts as belonged appropriately to that court. A careful specific enumeration was made of all the classes of cases so as to be transferred as we have already mentioned. It was made the duty of the district judge to take the necessary steps to get possession of these specific records from the clerks of the old courts, or persons or officers having them in their possession, these expressions, 'other officers or persons,' pointing obviously to the clerks of the state courts, who had in fact succeeded to the custody of the papers. This precise enumeration of cases to be transferred from the state courts leads irresistibly to the inference that Congress acquiesced in the retention by the state courts of all the other cases and the papers belonging to them. The act of the Legislature providing for the transfer of all these cases not thus enumerated had been passed more than a year and a half, and the state courts, under authority of that law, had possessed themselves of them, and had been adjudicating them for nearly the same period. It is impossible to avoid the conclusion that this act of the Legislature and the action of the courts under it received the sanction of Congress in the act of 1847,so far as they were not in conflict with that act. Besides this, Florida has followed many an elder sister into the Union, and the same provisions had been repeatedly made for the transfer of federal causes to the district courts, accompanied by long acquiescence in the assumption by the courts of the new states of the jurisdiction over causes not federal. The clearness and force of this inferential sanction of Congress is fully recognized both by the Supreme Court of the United States and by the Supreme Court of this state...*..*..* Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication, and a subsequent assent would doubtless operate upon past acts of transfer by the state authority."

Section 4 of the enabling act, as approved June 16, 1906, (Stat. at Large U. S. 1905-06, pt. 1, p. 271, c. 3335), provides as follows:

"And if the Constitution and government of said proposed state are republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the results of said election and the statement of the votes cast thereon and a copy of said Constitution, articles, propositions and ordinances, to issue his proclamation announcing the result of said election; and thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states."

The only limitation is that the Constitution and state government shall be "republican in form" and comply with the provisions of said act. All other provisions which the constitutional convention had the power to insert by reasonable implication are permitted and concurred in, the act of the President consummating the same.

We conclude that the district court of Oklahoma county has jurisdiction of this offense and the power to prosecute it to a final determination. The relator is remanded to the custody of the respondent.

Writ of *habeas corpus* is denied.

All the Justices concur.

Ex parte BROWN.

No. 44. Opinion Filed March 18, 1908.

(94 Pac. 556.)

JURISDICTION—Venue—No Prosecution before Statehood. Where an indictment for the crime of assault with intent to kill with a deadly weapon was returned after the admission of the state into the Union for an offense committed under the territory of Oklahoma, where no prosecution had been begun before said date, it is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application by Ira Brown for writ of *habeas corpus.* Denied.

Thos. H. Doyle, for relator.

Charles West, Atty. Gen., and *W. C. Reeves,* for respondent.

WILLIAMS, C. J. In the Month of December, 1907, after the admission of the state into the Union, a grand jury of Kay county, state of Oklahoma, formerly a county under the territory of Oklahoma, returned into the district court thereof an indictment charging relator with the crime of asault with intent to kill by means of a deadly weapon, alleging that said crime was committed under the territory of Oklahoma and prior to the admission of the state into the Union, laying the venue in Kay county, said indictment being in proper form. Thereafter said relator was duly arraigned and tried before a jury of said court, and a verdict of guilty returned as charged in said indictment, and sentence pronounced.

On the 22d day of January, 1908, said relator filed in this court his petition for writ of *habeas corpus,* alleging that he was unlawfully restrained by the sheriff of said county of his liberty, and, further that the offense for which he stood indicted was committed, if at all, under the territory of Oklahoma and prior to the admision of said state into the Union, and that the government of the United States had not given its consent to the state of Oklahoma, or any consent, whereby or whereunder he could be indicted or prosecuted under the authority of the said state for said offense if committed, and, further, that said state had not consented to receive and had not accepted or assumed the right to so prosecute him for such offense as alleged in said indictment. A writ of *habeas corpus* was issued out of this court on said date, returnable on the 25th day or said month, and the sheriff of said county made a return thereon showing that he held said relator in his custody as such sheriff by virtue of a commitment on said judgment and sentence issued by the district court of the state of Oklahoma for said county. The relator demurred to said return.

In the case of *Ex parte Bailey* (decided at this term of court and reported in this volume), 94 Pac. 553, it was held by this court that where an indictment for the crime of murder returned after the admission of the state into the Union for an offense committed under the territory of Oklahoma, where no prosecution whatever had been begun before said date, the district court of the state in the county in which the offense was committed had jurisdiction. That case controls this case.

The relator is remanded to the custody of the sheriff of Kay county, with instructions to carry out the sentence of said court. Writ of *habeas corpus* is denied.

All the Justices concur.

Ex parte ELLIS.

No. 22. Opinion Filed March 10, 1908.

(94 Pac. 556.)

JURISDICTION—Venue—Statehood—Transfer of Causes. An indictment for the crime of larceny and receiving stolen property, returned by a grand jury of the Western district of the Indian Territory prior to the admission of said territory into the Union as a part of the state of Oklahoma charging that said offense had been committed within said district on the 13th day of November, A. D. 1907, is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application of L. L. Ellis for writ of *habeas corpus.* Writ denied.

On the 15th day of November, A. D. 1907, just prior to the admission of the state into the Union, the grand jury for the Western District of the Indian Territory returned an indictment into the United States court in said district at Muskogee against the relator, charging him with having committed the crime of larceny and receiving stolen property in said district on the 13th day of said month. On the same date relator was apprehended by virtue of a bench warrant issued on said indictment, and incarcerated in the federal jail at Muskogee. And thereafter, on the 3rd day of December, A. D. 1908, the relator made application for a writ of *habeas corpus* before the judge of the district Court of the United States for the Eastern District of the state of Oklahoma, at Muskogee. Said relator on the 4th day of December, 1907, was brought before said judge by the marshal of sid district , and as a return to said writ showed that he held the relator by virtue of a commitment duly issued on said indictment. Said judge held that the United States court for said district (1) had no jurisdiction to finally determine said cause; (2) that relator was charged with a crime, and should not be released; (3) that the district court for the county of Muskogee of the Third judicial district of the state of Oklahoma had jurisdiction to hear and try and finally determine the charge against relator; (4) that the marshal should deliver him to said district trial court, etc.

On the 5th day of said month relator was delivered to the sheriff of said county, and on the same date his petition for writ of *habeas corpus* was filed with said state court praying that, if said state court should take jurisdiction, bail should be allowed, but, if said court should not take jurisdiction for such purpose, it should direct the sheriff of said county to release the prisoner. After hearing said petition, said court entered an order refusing bail, and dismissed said petition, and refused to order his release. To all of which relator excepted.

Thereafter, on the 17th day of December, A. D. 1907, said relator filed application in this court for writ of *habeas corpus*, at the same time praying for a writ of *certorari* directing the clerk of said district court for Muskogee county to certify up to this court the record of said proceedings. On January 2, 1908, the clerk of said county having duly certified up the record of said proceedings, and the sheriff making return to said writ to the effect that he held said prisoner under said indictment by virtue of an order from the judge of the United States District Court for the Eastern District of Oklahoma, the relator demurred to said return.

Powell & Parks, for relator.

Charles West, Atty. Gen., and *W. C. Reeves*, for respondent.

WILLIAMS, C. J. (after stating the facts above.) This case is controlled by the decision in the case of *Higgins v. Brown* (decided at this term of court and reported in this volume) 94 Pac. 703, wherein it is held that an offense committed within the jurisdiction of the United States court of the Indian Territory, not of a federal character, prior to the admission of the state into the Union, and pending in such court at said time, is cognizable in the district court of the state as successor to such court, in the county in which the offense was committed. The district court of the county of the state in which such offense was committed has jurisdiction of this case. The offense charged being a bailable one, the relator is entitled to be discharged on reasonable bail.

The writ for the discharge of the prisoner is denied. However, if the court below fails to take jurisdiction, and enter an order allowing reasonable bail, after being advised of our conclusions, upon further application an order will be entered in this court allowing relator to be discharged upon bail in a reasonable amount.

All the Justices concur.

Ex parte STEVENSON.

No. 73. Opinion Filed March 25, 1908.

(94 Pac. 1071.)

1. **JUDGMENT—Res Judicata—Burden of Proof.** The burden of proof rests upon a party who alleges a former adjudication.
2. **SAME—Record—Evidence—Necessity.** The record entry of a judgment is indispensable to prove the evidence of it when it is made the basis of a claim or defense in another court.
3. **HABEAS CORPUS—Hearing—Evidence—Insufficiency.** Where a person in custody alleges in his petition for writ of habeas corpus in the Supreme Court, that another court of competent jurisdiction has made an order granting him bail after indictment for a capital offense, and the evidence on the hearing shows that no such order was ever entered of record in the office of the clerk of the court alleged to have granted the same, there is a failure of proof on the part of the petitioner to establish the existence of such order, and his application for the writ should be denied.

(Syllabus by the Court.)

Application of James Stevenson for writ of *habeas corpus.* denied.

Pruiett, Cardwell & Sniggs and *Yerker E. Taylor,* for petitioner.

Charles West, Atty. Gen., W. C. Reeves, Asst. Atty. Gen., and *R. T. Jones,* for the state.

KANE, J. This is an original proceeding for writ of *habeas corpus* brought by James Stevenson to secure his release from custody on bail.

The petitioner urges two grounds on which he claims his right to the writ; the first being that after his indictment for a capital offense he applied to the honorable Hosea Townsend, who at that time was judge of the United States court for the

Southern district of the Indian Territory, for bail, and that said judge admitted the petitioner to bail in the sum of $5,000. The petition further alleges that, after the transition of said district court of the Southern district of the Indian Territory into the district court of the state of Oklahoma, the state court in said district refused to admit the petitioner to bail under the order issued by Judge Townsend. The second ground alleged in the petition is to the effect that the petitioner applied to the Honorable R. McMillan, Judge of the Fourteenth Judicial district of the state of Oklahoma, to be admitted to bail, and a hearing upon said application was had in the city of Norman, Cleveland county, on the 2nd day of January, 1908, when evidence was introduced on behalf of the petitioner and the state of Oklahoma; that, upon considering said testimony and evidence, the Honorable R. McMillan, judge of the said court, "committed your petitioner to the common jail of Cleveland county, to be held upon said indictment without bail." The petition further alleges that said restraint is illegal, and that the petitioner is not guilty of the crime of murder, or any other crime, and that the proof of guilt is not evident, nor the presumption thereof great. The alleged order, as shown by a purported copy thereof attached to the petition, reads as follows:

> "On this 15th day of November, 1907, this cause comes on to be heard upon the application of the defendant for an allowance of bail herein, and after reading the petition, and being fully advised in the premises, the court is of the opinion that the presumption of the defendant's guilt is not great and that the defendant is entitled to bail herein. It is therefore ordered, adjudged, and decreed by the court that the United States marshal for the Southern district of the Indian Territory do forthwith release the defendant herein upon his executing bond as required by the law in the sum of five thousand dollars."

The contention of counsel for petitioner is that, "when a person charged with a capital offense has once been admitted to bail after indictment found, he shall not be subject to be again placed in custody for the same offense, except on surrender by his sureties, whether the bail be granted on facts or on acount of ill health. In other words, when bail is once granted after indictment found, it is beyond the power of the state to rearrest for the same offense; the right to bail being *res adjudicata*." There is no allegation in the petition that the petitioner has ever presented a bail bond in the sum of $5,000, to the proper officer, and demanded his release, but that informality probably could be overlooked if the petitioner could have established by competent evidence that a judgment or order granting bail had been duly and regularly rendered; thus properly presenting to this court the question of former adjudication. It was shown on the hearing of this application, by the certificate of C. T. Vernon, clerk of the state district court of Carter county, and the affidavit of W. S. Crockett, deputy clerk of the United States court for the Southern district of the Indian Territory, that no order granting bail was ever entered of record in the journal of either the United States court for the Southern district of the Indian Territory or the state district court of Carter County, Okla.

The necessity of entering judgments and the importance thereof is well stated in 1 Freeman on Judgments, 37:

"The promptings of the most ordinary prudence suggest that whatever in the affairs of men has been so involved in doubt and controversy as to require judicial investigation ought, when made certain by final determination, to be preserved so by some permanent and easily understood memorial. Hence all courts and all tribunals possessing judicial functions are required by the written or unwritten law, and often by both to reduce their decisions to writing in some book or record kept for that purpose. The requirement is believed to be of universal application."

Judge Freeman in the same section, discussing the effect of non-entry, says:

"While the entry is not the judgment, its absence tends strongly to indicate that no judgment exists."

In 1 Black on Judgments, § 106, the same rule is stated thus:

"The record entry of a judgment is indispensable to furnish the evidence of it, when it is made the basis of a claim or defense in another court."

The authorities uniformly hold that "the burden of proof rests upon the party who alleges a former adjudication." (1 Van Fleet's Former Adjudication, § 274.) Franklin, C., in *Dunning et al. v. Seward,* 90 Ind. 63, discussing a question similar to the one involved here, says:

"The second specification of errors by Josiah and Mortimer Dunning was sustaining the demurrer to the third paragraph of their answer. This paragraph of the answer attempted to plead *res adjudicata.*"

The syllabus of the above case, having relation to this particular point, holds that an answer averring a former division against the plaintiff, on a motion for the same relief in another case, and disclosing that there is no record of the decision, is bad on demurrer. The above case seems to be precisely in point herein, and supports the doctrine that where a person in custody alleges in his petition for a writ of *habeas corpus* in the Supreme Court that another court of competent jurisdiction has made an order granting him bail after indictment for a capital offense, and the evidence on the hearing shows that no such order was ever entered in the office of the clerk of the court alleged to have granted the same, there is a failure of proof on the part of the petition to establish the existence of such order, and his application for the writ should be denied.

In the record before us it would seem that the question of former adjudication was not raised in the application for writ of *habeas corpus* before Judge McMillan, but that the case was there presented upon the evidence, and Judge McMillan found against the petitioner. Under the common law administered in England, if one judge refused to discharge a prisoner on a writ of *habeas corpus,* he could apply to another, and so on, until he had taken the opinion of all the judges accessible. We do not want to be understood as adopting or rejecting the common-law rule or as passing upon the effect of the judgment of Judge McMillan as an estoppel to an original application for writ of *habeas corpus* before this court. It is true the same evidence that was presented to Judge McMillan is before us, as an exhibit to the petition, but still, "where a case had already been once heard upon a *habeas corpus* and the prisoner has been remanded, another court will not always deem it expedient to grant another writ and hear the case again on the same evidence." (Church on Habeas Corpus, § 187.)

The writ of *habeas corpus* is denied, and the petitioner is remanded to the custody of the sheriff of Cleveland county, state of Oklahoma.

Williams, C. J., and Dunn, Hayes, and Turner, JJ., concur in the conclusion denying bail.

HUBBARD v. TERRITORY.

No. 1866, Okla. T. Opinion Filed April 14, 1908.

(95 Pac. 217.)

INDICTMENT AND INFORMATION—Amendment. An information charging defendant with imputing to a female a want of chastity, under an act approved March 13, 1905 (Sess. Laws 1905, p. 196, c. 13), cannot be so amended, after acquittal, as to charge defendant with lascivious language in a public place, under Wilson's Rev. & Ann. St. Okla. 1903, sec. 1959, without being sworn to as provided in section 1883 of said statute.

(Syllabus by the Court.)

Error from Probate Court, Grant County; before A. C. Glenn, Judge.

A. E. Hubbard was convicted of crime, and brings error. Reversed.

On July 24, 1905, there was filed in this cause in the probate court of Grant county, Oklahoma Territory, the following information:

"Territory of Oklahoma v. Bert Hubbard.
"Information.

"I, the undersigned, county attorney of said county, in the name, by the authority, and on behalf of the territory of Oklahoma, give information that on the 22d day of July, A. D. 1905, in said county of Grant and territory of Oklahoma, one Bert Hubbard did then and there unlawfully, willfully, falsely, maliciously, and wantonly impute to a certain female, then and there a resident of Oklahoma territory, a want of chastity, by the use of the following language, to wit: * * * (meaning Mona M. Godfrey) and he can't help it'—contrary to the form of the statute in such cases made and provided against the peace and dignity of the territory of Oklahoma.

F. G. WALLING, County Attorney.

"Territory of Oklahoma, County of Grant—ss.:

"I do solemnly swear that I have read the above and foregoing information, and the statements therein contained are true.

"JOHN NEEDLES.

"Subscribed and sworn to before me this 24th day of July, 1905.

"[Seal] A. C. GLENN,

"I have examined the facts in this case and recommend that a warrant issue.

"F. G. WALLING, Co. Atty."

On the same day a warrant of arrest was duly issued for the defendant. On September 16, 1905, defendant appeared in court and waived arraignment and was released on bond. On November 15, 1905, he filed a demurrer to the information, which was overruled, to which he excepted, pleaded not guilty, waived a jury and was tried by the court. Upon all the evidence submitted on both sides the court found the defendant not guilty of imputing a want of chastity to a female, as charged in the information, but found him guilty of using obscene language in a public place; and thereupon the court permitted the prosecution to amend the information to charge the offense of using obscene language in a public place by writing into the said information as filed the words: "Said language being uttered and made in a public place in said county, to wit in the town of Nashville, on the public streets of said town, in the presence of a great many persons"—to all of which amendment and alteration of the original information, and as to the finding defendant guilty of using obscene language in a public place, the said defendant objected and excepted, which objections and exceptions were overruled by the court. The defendant then asked to be discharged, which was by the court denied and refused, to which the defendant excepted.

The court thereupon offered to permit said cause to be continued to give the defendant opportunity to offer further testimony, and to reopen the case and hear evidence on behalf of defendant in rebuttal of said charge, which defendant said he did not desire to do, or have the cause reopened, or offer further testimony, but insisted on being discharged under the finding by the court. Thereafter defendant duly filed a motion for a new trial, which was overruled by the court, to which ruling defendant excepted, and filed his motion in arrest of judgment, which was overruled by the court, to which ruling defendant also duly excepted, whereupon the court sentenced him to serve a term of 10 days in the county jail and to pay a fine and the costs of this action, in all $90.05, to which the defendant objected and excepted, and has brought his case for a review to this court on petition in error and case- made.

Sam P. Ridings, for plaintiff in error.

Charles West, Atty. Gen., and *W. C. Reeves, Asst. Atty. Gen.,* for the state.

TURNER, J. (after stating the facts as above). Plaintiff in error insists, among other assignments of error, that "the court erred in permitting defendant in error to amend the information after the case was closed and to charge another distinct offense." The offense charged in the information, before amendment, is defined in an act approved March 13, 1905 (Sess. Laws 1905. p. 196, c. 13), which reads: Section 1:

> "If any person shall orally or otherwise, falsely and maliciously or falsely and wantonly impute to any female in this territory, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and upon conviction shall be fined not less than twenty-five dollars nor more than five hundred dollars. or by imprisonment in the county jail not less than thirty days nor more than ninety days, or by both such fine and imprisonment."

Said information, as amended, charges a wholly different offense, which is defined in Wilson's Rev. & Ann. St. Okla. 1903, § 1959, which reads:

> "If any person shall utter or speak any obscene or lascivious language or word in any public place, or in the presence of fe-

males, or in the presence of children under ten years of age, he shall be deemed guilty of a misdemeanor and upon conviction thereof before any justice of the peace of this territory, he shall be liable to a fine of not more than one hundred dollars, or imprisonment for not more than thirty days, or both, at the discretion of said justice."

Under the very liberal practice laid down in section 1883 of said statutes, the trial court was authorized to permit the amendment complained of by defendant with that statute, which reads:

"All criminal actions prosecuted in the probate court shall be brought in the same manner as similar actions in the justice courts; or shall be upon information of the county attorney based upon a sworn complaint and shall be under his direction and control; and warrants shall issue the same as in the justice courts; Provided, if any complaint or information be adjudged defective or insufficient it may be amended to any extent and sworn to until it is sufficient, and if the evidence fails to prove the crime charged, but tends to prove any other crime the information may be amended to charge the crime which the evidence tends to prove, and if that be a felony the trial shall be suspended and the accused shall be proceeded against by preliminary examination and bound over or discharged as the court shall deem just under the evidence. If the information or complaint be amended, the court shall see that the defendant is not prejudiced thereby and if justice requires it shall grant to the accused time to prepare his defense to the information or complaint as amended."

But the court was not authorized to permit said amendment unless the information was afterwards sworn to, as provided in that section. It appears from the record that the information, after amendment, was not sworn to or based upon any sworn statement whatever.

The conviction of this defendant under this amended information was therefore erroneous, and the judgment of the lower court must be reversed, and it is so ordered.

All the Justices concur.

Ex parte BUCHANEN.

No. 27. Opinion Filed April 15, 1908.

(94 Pac. 948.)

JURISDICTION—Manslaughter—Offense Antedating Statehood. Where an indictment for the crime of manslaughter, an offense committed under the laws in force in the Indian Territory, is returned after the admission of the state into the Union, no prosecution whatever having been begun prior to such date it is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application by Frank Buchanen for writ of *habeas corpus*. Writ denied.

The relator, Frank Buchanen, is charged with having killed, on the 8th day of October, 1907, near Braden, Le Flore county, Okla., then Indian Territory, one Wayne Noblin, in such a manner as to constitute manslaughter, by indictment returned on the 12th day of December, 1908, at the December term of the district court for the Fifth judicial district of the state, held in Le Flore county. It is further stipulated of record that on November 19, 1907, an information was filed by the county attorney of Le Flore county with the county judge of said county, and a warrant was thereupon issued for the arrest of relator, and on the 21st day of November, 1907, the relator was apprehended by virtue of said warrant, and on the 4th day of December, 1907, a preliminary hearing was had before said county judge, whereupon said relator was committed to jail to await the action of the grand jury; and the relator is now detained by said sheriff by virtue of a commitment issued by the district court of said county on said indictment.

Day & Du Bois, for relator.

Charles West, Atty. Gen., and *W. C. Reeves, Asst. Atty. Gen.* for respondent.

WILLIAMS, C. J. (after stating the facts as above). We have decided at this term of the court in the case of *Ex parte Bailey*, reported in this volume, 94 Pac. 442, that an indictment for the crime of murder—an offense committed under the territory of Oklahoma—returned after the admission of the state into the Union, where no prosecution whatever had been begun before such date of admission, is cognizable in the district court of the state in the county in which the offense was committed. The question is now presented whether or not a prosecution for the offense of manslaughter committed in that part of the state formerly known as the Indian Territory, where no prosecution whatever had been begun—not even a complaint or information having been filed against the accused—prior to the admission of the state into the Union, can be instituted in the state courts and prosecuted to final judgment thereafter. Section 20 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) as amended March 4, 1907, (34 Stat. 1287, c. 2911) provides as follows:

> "That all causes , proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States Courts in the Indian Territory, at the time said territories became a state, not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be proceeded with, held, and determined by the courts of said state, the successors of said district courts of the territory of Oklahoma and the United States Courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said state, and also with the same right to prosecute appeals or writs of error from final determination in such cases made by the supreme or appellate court of such state to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a state to the Supreme Court of the United States. *All criminal cases pending in the United States Courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory."*

In the decision of this court in the case of *Higgins v. Brown* (decided at this term of court and reported in this volume), 94 Pac. 703, it was held said section, having been concurred in on the part of the state by virtue of provisions contained in sections 27 and 28 of the Schedule to the Constitution , vested jurisdiction in the proper state courts of all criminal cases, not of a federal character, pending at the time of the admission of the state into the Union in the territorial courts of Oklahoma and in the United States Courts in the Indian Territory, and in that same case it was held that if the crime of murder was committed in what was formerly the Indian Territory, not within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state, such offense was cognizable in the state courts. To make such a construction as to necessitate the conclusion that the state courts would not have jurisdiction of such character of crimes, not of a federal nature or character, as might have been committed prior to statehood on the Indian Territory side, where no prosecution had been begun, would be tantamount to holding that it was the intention of Congress and of the constitutional convention that such crimes, not of a federal character, should not be prosecuted to a final judgment; for, although they had been defined as offenses by the laws in force in the Indian Territory, of the United States, they would not be cognizable within the federal courts after the admission of the state into the Union. *Moore v. United States,* 85 Fed. 465, 29 C. C. A. 269.

Section 1 of the Schedule to the Constitution provides:

"No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of the government, but all shall continue as if no change in the form of government had taken place. And all process which may have been issued previous to the admission of the state into the Union, under the authority of the territory of Oklahoma, or under authority of the laws in force in the Indian Territory, shall be as valid as if issued in the name of the state."

When this provision is construed in the light of the provisions of section 20 of the enabling act, as amended by the act of March 4, 1907, we are aided in reaching an interpretation as to what was intended by said section 1, *supra;* and we conclude that said provision has the same effect as that contained in said section 20, *supra,* where it is stipulated that certain cases "shall be prosecuted to final determination in the state district courts of Oklahoma under the laws now in force in that territory." In the case of *Moore v. United States,* 85 Fed. 468, 29 C. C. A. 272, *supra,* the court says:

> "Its civil and political powers were transferred to other officers; those of peculiarly internal character to officers of the new state; those which bore any relation of the national system of government, of which the state formed a part, to officers holding commissions under that system, and possessing only the powers derived from their commission. As one of the states of the Union, and in virtue of that character forming one of the districts of the United States, the district of Utah, and the Circuit Courts sitting in that district, would possess no peculiar jurisdiction or authority; one which did not appertain to other districts and the Circuit Courts having cognizance of matters within those districts."

In the case of *Shively v. Bowlby,* 152 U. S. 1, 48, 14 Sup. Ct. 548, 566, 38 L. Ed. 331, the court says:

> "By the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws on them, having the entire dominion and sovereignty, national and municipal, federal and state, over all the territories so long as they remain in the territorial condition," etc. (See, also, *Higgins v. Brown, ante,* this volume, and authorities therein cited.)

It may be contended, however, that the people of the state, through their constitutional convention, could not provide for the continuance of laws enacted by Congress for the government of the Indian Territory for the purpose of prosecuting to final judgment existing rights and actions, etc., having arisen thereunder prior to the admission into the Union. In the *Bailey Case, supra,* it was held that the only limitation upon the action of the convention was that the state government should be republican in form and the provisions of the enabling act complied with; everything else, which the convention had the power and the right to insert by reasonable implication, being permitted, and afterwards concurred in through the action of the President in issuing the proclamation admitting the state into the Union. In the case of *Ex parte Larkin,* 1 Okla. 53, 25 Pac. 745, 11 L. R. A. 418, it was decided that it was within the power of the Legislature of the territory of Oklahoma to continue in force after the adjournment of the Legislature certain laws of Nebraska extended to said territory by act of Congress known as the "Organic Act" for said territory (Act. May 2, 1890, c. 182, § 11, 26 Stat. 81), until the adjournment of the first Legislature thereof. Afterwards, in the case of *U. S. v. Pridgeon,* 153 U. S. 54, 14 Sup. Ct. 746, 38 L. Ed. 631, the *Larkin Case* is cited with approval. In the *Pridgeon Case* the offense was committed prior to the adjournment of the first Legislature of said territory, and he was tried and convicted in the proper court of said territory after the adjournment of said Legislature. If the Legislature at its first session could by enactment provide for the continuing in force of said laws, why could not the constitutional convention in like manner continue in force laws that had been in almost practically the same manner extended in force in the Indian Territory by Congress, for the purpose of continuing prosecutions for the violation of said laws prior to the admission of the state into the Union? *Benner v. Porter,* 9 How. 235, 13 L. Ed. 120; *U. S. v. Pridgeon,* 153 U. S. 53, 54, 14 Sup. Ct. 746, 38 L. Ed. 633; *Ex parte Larkin,* 1 Okla. 53, 25 Pac. 745; *U. S. v. Moore,* 85 Fed. 465, 29 C. C. A. 269.

Whilst we do not readily reach these conclusions, yet we are clear that it was the intention of Congress, as well as the constitutional convention, that malefactors, who had committed serious and grave offenses against society prior to the admission of the state into the Union, when there had been no opportunity to lodge indictments against them ought not to go unwhipped of justice, and thereby the law not being vindicated after such infractions. Further, it is not clear in our minds that, if we are in error in our conclusions that the state district court has jurisdiction of such offense, that Congress can hereafter make provision for the final prosecution of such cases, still, in any event, such accused persons have the highest judicial tribunal of our Republic open to them in which to have determined whether or not they are unlawfully deprived of their liberty, and in the event it were determined in that forum that this court has erred, the decision of such court would certainly be very persuasive with the Congress of the United States to cause it to take any possible action for the final prosecution of such offenses. And especially are we moved to take this course as it is a matter of record that the United States judge for the Eastern District of Oklahoma has ordered and directed that all prisoners in the custody of United States marshals for the several districts in the Indian Territory at the time of the admission of the state into the Union, charged with offenses not of a federal character, whether or not they were held by indictments or complaints filed with United States commissioners, be delivered over to the custody of the state authorities. It certainly will not be seriously contended that where a prisoner was being held by virtue of a commitment from the United States commissioner, he being apprehended by virtue of a warrant issued by such commissioner on a complaint filed before him, that such cause was pending at the time of the admission of the state into the Union in the United States court of the district in which said commissioner was located. *Virgina v. Paul,* 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; *Ex parte Johnson,* 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *State v. Arlin,* 39 N. H. 179. To hold that the proper state court has no jurisdiction of such offenses is equivalent to opening the jail doors and turning loose dangerous felons upon society without a trial before a jury. We are constrained to adopt the reasoning that results in the proper state court having jurisdiction of such offenses, not being unmindful, however, of the rights and liberties of the accused. A speedy and fair trial is vouchsafed to every accused by the highest law of our land. By this chart, not only are the rights of the individual protected, but the interests of society are likewise safeguarded. Where the accused is afforded a speedy and fair trial, with the presumption of innocence as a shield, before a jury of his peers, no one has just cause for complaint. There is nothing in our holding that militates against this principle. See Church on Habeas Corpus (2d Ed.) p. 123, § 84; *In re Friedrich* (C. C.) 51 Fed. 747; *In re Wo Lee* (C. C.) 26 Fed. 471; *Spickler v. Block,* 43 Fed. 653, 10 L. R. A. 446.

Writ of *habeas corpus* denied.
All the Justices concur.

Ex parte PATMAN.

No. 106. Opinion Filed April 15, 1908.

(95 Pac. 622.)

1. **HABEAS CORPUS—Object of Writ.** The writ of habeas corpus is not designed to operate as a writ of error or certiorari, and does not have their effect. It deals with irregularities which render proceedings void.
2. **SAME—Procedure—Review of Facts.** The court on habeas corpus will not, for the purpose of discharging the relator, consider the sufficiency of facts relied on as evidencing that he is being prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may have testified or produced evidence in another court.
3. **SAME.** The writ of habeas corpus cannot be resorted to for the purpose of discharging the relator on a plea set up in the petition praying for such writ that by indictment in a court of competent jurisdiction he is being prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may have so testified or produced evidence in such court.

(Syllabus by the Court.)

Application of Thomas Patman for writ of *habeas corpus.* Writ denied.

Prior to the admission of the state of Oklahoma into the Union the relator, Thomas Patman, was jointly indicted with Ben Titsworth and Eugene Titsworth by a grand jury in the United States Court for the Western District of the Indian Territory, at Muskogee, charging them with the crime of murder. Relator in his petition in this action states that he had knowledge and was in possession of facts that tended to establish the guilt of said Eugene F. Titsworth of the crime of murder of which he, the said Eugene Titsworth, was indicted, and the petitioner was not excused by the said state of Oklahoma from giving such facts of which he was in possession and acknowledged to against said Eugene Titsworth to his attorneys at the trial of said Eugene Titsworth, but was called upon by the state of Oklahoma to testify in said cause on the part of the state of Oklahoma, and did so testify, and that the evidence given and testified to by the said petitioner did tend to incriminate and did incriminate this petitioner under the laws of the state of Oklahoma and under the Constitution of said state of Oklahoma, and that this petitioner is being held in the United States jail at Muskogee by the respondent, R. M. Ramsey, as sheriff of Muskogee county, state of Oklahoma, and is being prosecuted and subjected to the laws of the state of Oklahoma on account of the matters and things about which the prisoner testified to and gave evidence of, and is now, in consequence of the charge of this petitioner, deprived of his liberty by the said R. M. Ramsey, sheriff of Muskogee county, state of Oklahoma, in violation of the provisions of the Constitution of the state of Oklahoma under article 2, § 27, and under the act of Congress of February 11, 1893, c. 83, 27 Stat. 443 (U .S. Comp. St. 1901, p. 3173). The relator therein prays for the issuance of a writ of *habeas corpus* directing and commanding the said sheriff to bring the body of said petitioner before this court that the matters and things therein alleged may be duly inquired into, and that after due examination of same he be discharged from jail and given his liberty.

Said petition was duly filed with this court on March 11, 1908, and writ of *habeas corpus* was issued on the 20th day of March A. D. 1908, returnable on the 28th day of March, A. D. 1908. On said date the respondent duly made his return which was as follows:

"(1) That he has the body of said Thomas Patman in his custody in his official capacity as such sheriff. (2) That he holds said Thomas Patman under and by virtue of an order of commitment of the district court of Muskogee county, state of Oklahoma, same being in conformity to law in all respects; said relator having been transferred to him as such sheriff by the United States marshal of the Eastern district of the state of Oklahoma; said relator having been held by the United States marshal under and by virtue of an order of commitment issued in a certain criminal prosecution by indictment for the crime of murder alleged to have been committed in the Western District of the

Indian Territory prior to the admission of Oklahoma into the Union and which said prosecution by indictment was pending in the United States Court for the Western District of the Indian Territory upon November 16, 1907. (3) Copy of the order showing the return of the indictment against the said defendant in the United States Court for the Western District of the Indian Territory on the 23rd day of October, A. D. 1907, showing that the said relator was indicted separate and alone of the crime of murder and not jointly with Eugene Titsworth and Ben Titsworth, charging said Thomas Patman with having, on the 5th day of July, 1907, in the Western District of the Indian Territory, murdered one Sam Roberts, and showing that said relator was held without bail, and that on the 24th day of February, A. D. 1908, he was delivered by the said United States marshal for said district to the respondent, as sheriff of Muskogee county."

Chas. E. Bagg and *Williams & Williams,* for relator.

Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for respondent.

WILLIAMS, C. J. (after stating the facts as above). The relator being held in custody by the sheriff of Muskogee county to answer an indictment pending and undetermined in the district court of said county for the crime of murder, a writ of *habeas corpus* is prayed for by relator, not that he may be discharged on bail but it is claimed by him that he is entitled to an *absolute and unconditional* discharge from custody.

In the case of *Perry v. State,* 41 Tex. 489, the court says: "The right to discharge is based upon the fact of appellant having previously been convicted in said court on another indictment for theft of a steer, found at the same term of the court as the indictments under which he is now held in custody. All of said indictments, it is insisted, having been found on the same evidence, and on account of the same transaction, are therefore claimed to be for one and the same supposed offense. An application for *habeas corpus* for the purpose and under the circumstances for which this was made is certainly novel and without precedent in the courts of this state. It would seem to have long since been much too well established by the common law as well as our statutes that an indictment not void upon its face, regularly returned to and pending in a court having jurisdiction thereof, could only be disposed of by some appropriate proceeding in such court for an experiment such as the present. The practice at common law in the court of King's Bench is thus stated in Wilmont's Opinion, 106 (Hurd on Habeas Corpus, 331): 'In imprisonment for criminal offenses the court can act upon it only in one of three manners: (1) If it appear clearly that the fact for which the party is committed is no crime, or that it is a crime, but he is committed for it by a person who has no jurisdiction, the court discharges. (2) If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction, or if it appears to be a crime, but a bailable one, the court bails him. (3) If an offense, not bailable, and committed by a competent jurisdiction, the court remands or commits him. It is certainly essential to the proper discharge of its duties, and the due and sufficient administration of the law that whenever a court assumed to act in a matter, and over parties within its jurisdiction, it is its right and duty to proceed to its final determination without interference from any other tribunal.' The writ of *habeas corpus* was not granted to operate as a *writ of error or certiorari,* and does not have their force and effect. It does not deal with error or irregularities which render proceedings voidable, merely, but such only as render them absolutely void."

In the case of *Ex parte Crofford,* 39 Tex. Cr. R. 548, 47 S. W. 533, the court says:

"Relator was placed upon trial before a jury in the district court of Montague county on the charge of murder. The jury retired to consider their verdict on the 10th of August On the morning of the 12th, in the absence of the defendant, the jury was brought into court and discharged from further consideration of the case. It is shown by the judgment of the court that the court adjudicated the question as to the probability of their agreeing to a verdict. The defendant was not present, and not consulted in regard to the discharge of the jury. In fact he was in jail at the time. He resorted to the writ of *habeas corpus* for the purpose of seeking his discharge on the ground that he had been placed in jeopardy and could not be tried again; and this is the only ground alleged by the relator, and upon the hearing of the writ remanded relator to custody, and this appeal is prosecuted therefrom. This is not a novel case in Texas. Since the case of *Perry v. State,* 41 Tex. 488, the decisions have been uniform that the writ of *habeas corpus* cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. See, also, *Darrah v. Westerlage,* 44 Tex. 388; *Ex parte Scwartz,* 2 Tex. App. 74; *Griffin v. State,* 5 Tex. App. 457."

In this case, the relator being held by virtue of an indictment pending in a court of competent jurisdiction, and over parties within its jurisdiction, it is certainly its right and duty to proceed to its final determination without interference from any other tribunal. In the case of the *United States v. Armour & Co.* (D. C.) 142 Fed. 818, Humphrey, district judge, says: "* * * That the officer or agent of the corporation, if the facts bring him within the purview of the law, *may plead* such immunity." In the case of *Hale v. Hinkle,* 201 U. S. 68, 26 Sup. Ct. 376, 50 L. Ed. 663, the Supreme Court of the United States says: "The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his *plea,* is more fanciful than real." Where shall the party charged with a crime by indictment plead such immunity? Certainly not in another court in a proceeding for writ of *habcas corpus,* but in the court where the indictment is pending, just like any other plea in abatement or bar may be made and entertained.

Writ of *habeas corpus* denied.

All the Justices concur.

Ex parte CURLEE.

No. 28. Opinion Filed April 27, 1908.

(95 Pac. 414.)

JURISDICTION—Venue—Offense Antedating Statehood. Where an indictment for the crime of embezzlement—an offense committed under the laws in force in the Indian Territory—is returned after the admission of the state into the Union, no prosecution whatever having been begun prior to the admission of the state into the Union, except the filing of a complaint with the United States Commissioner and the issuance of a warrant and the apprehension of the prisoner, said offense is cognizable in the district court of the state in the county in which the offense was committed.

(Syllabus by the Court.)

Application of J. W. Curlee for a writ of *habeas corpus.* Writ denied.

On the 26th day of December, 1907, relator filed his petition with the clerk of this court praying for a writ of *habeas corpus,* alleging that he was unlawfully imprisoned and restrained of his liberty by George B. Noble, sheriff of Le Flore county, Okla. The writ was issued returnable on the 11th day of January, A. D. 1908. Said respondent made return to said writ as follows:

"The above defendant, J. W. Curlee, is detained by George B. Noble, as sheriff of said county, by virtue of a warrant of commitment charging him with the crime of embezzlement committed on or about the 1st day of September, 1907, which said warrant was issued by John R. Pollan, United States commissioner for the Central district of the Indian Territory, on or about the 9th day of November, A. D. 1907; and on the 11th day of January, A. D. 1908, it was stipulated as a matter of record that the said relator is charged with having embezzeled from the Pioneer Telephone Company, in September, 1907, the sum of $293, at Spiro, then Indian Territory, now Le Flore county, state of Oklahoma. That relator was arrested upon said charge upon a warrant regularly issued by John R. Pollan, United States commissioner, on November 7, 1907, and upon preliminary hearing before said commissioner on the same day was held to await the action of the grand jury, and committed to jail at McAlester in default of bond."

Thereafter, on the 7th day of December, 1907, said relator was delivered by the United States marshal of the Eastern district of the state into the custody of the respondent, as sheriff of Le Flore county, state of Oklahoma. That on December 14, 1907, at the December term of the District court in and for Le Flore county, the grand jury returned an indictment against said relator, charging him with said offense. That since his delivery to the said George B. Noble, as sheriff, up to the present time, relator has been detained, and is in his custody on said charge.

Day & Du Bois, for relator.

Chas. West, Atty. Gen. and *W. C. Reeves, Asst. Atty. Gen.* for respondent.

WILLIAMS, C. J. (after stating the facts as above.) We have decided at this term of court in the case of *Ex parte Buchanen,* 94 Pac. 943, that an indictment for the crime of manslaughter—an offense committed in the Indian Territory prior to its admission into the Union, and returned after such time, where no prosecution whatever had been begun before such date of admission—is cognizable in the district court of the state in the county in which the offense was committed. See, also, *Ex parte Bailey,* 20 Okla. 497, 94 Pac. 553; *Ex parte Brown,* 20 Okla. 505, 94 Pac. 556; *Higgins v. Brown,* 20 Okla. 355, 94 Pac. 703.

The relator is prosecuted under section 1638, Mansfield's Digest of the Statutes of Arkansas, which were extended to and put in force in the Indian Territory by section 4 of an act of Congress approved March 1, 1895 (28 U. S. Stat. c. 145, p. 693); also section 33 of an act of Congress approved May 2, 1890 (26 U. S. Stat. c. 182, p. 81.)

In the case of *Merchant's National Bank of Bismarck v. Braithwaite,* 7 N. D. 358, 75 N. W. 246, 66 Am. St. Rep. 653, the court says:

> "Considering the provisions of the enabling act in connection with the failure of Congress to vest jurisdiction over territorial judgments in the federal courts, and the fact that Congress in passing the act must have contemplated that the state Constitution would create state courts having jurisdiction similar to that possessed by the territorial courts, and that these would be the better fitted to enforce judgments throughout the different counties in the state, we must infer an implied assent by Congress that jurisdiction over cases not pending should vest in state courts exclusively. Otherwise we must assume that those cases were to be left without any court possessing jurisdiction over them for any purpose whatever, for it is clear that no jurisdiction over them is vested by the enabling act in the federal courts."

In line with this decision cases, not of a federal character, not pending, involving offenses committed prior to the admission of the state into the Union, should vest in the state courts. Of course, non-pending actions of a federal character would necessarily vest in the United States courts in the state erected out of said territories just as they do in the United States courts in the other states. We had not found this case at the time the opinion was written in the case of *Ex parte Buchanen,* with which it is in harmony. The provisions of the Oklahoma enabling act being substantially those as contained in the enabling act for North and South Dakota, it is presumed that Congress in adopting the same for Oklahoma did it with a view of the construction that had been had thereon in North Dakota.

Under the authority of the Buchanen Case, which is supported by the case just cited from North Dakota, the writ of *habeas corpus* is denied.

All the Justices concur.

Ex parte WAGNER.

No. 32. Opinion Filed April 27, 1908.

(95 Pac. 435.)

1. CONSTITUTIONAL LAW—Initiative and Referendum. The initiative and referendum provisions in the Constitution (article 5, sections 1, 2, 3, 4, 5 and article 18, sections 4, 5) are not in conflict with the Constitution of the United States (section 4, art. 4), guaranteeing to every state a republican form of government.

2. SAME—Non-self-executing. Said provisions as contained therein are not self-executing, but are made effective by an act of the Legislature approved April 16, 1908.

3. MUNICIPAL CORPORATIONS—Ordinances—Premature Petition for Referendum. Until said provisions were made effective by legislation, a petition for a referendum of an ordinance filed with the chief executive officer of a municipality of the first class was of no effect.

4. HABEAS CORPUS—Violation of Ordinance—Petition for Referendum. An ordinance having been passed and published, and thereafter a petition for referendum filed with the mayor of Kingfisher, and afterwards said relator being convicted in said municipal court for an alleged violation after the filing of said petition, he is not entitled to be discharged from said conviction.

(Syllabus by the Court.)

Application of C. L. Wagner for a writ of *habeas corpus.* Writ denied.

On December 5, 1907, the mayor and council of the City of Kingfisher, Okla., passed an ordinance, No. 118, entitled "An ordinance providing for a levy and collection of a license tax on certain trades, occupations, callings, businesses and avocations, and regulating the same and providing penalties for violation thereof" The ordinance provided for the punishment of persons engaged in business without having paid a license tax as prescribed by said ordinance. On December 12, 1907, the ordinance was published. in the official organ of said city. On December 18, 1907, a petition signed by 25 per cent. of the qualified voters of said city, demanding a referendum vote on said ordinance and requesting that same be held in abeyance until such election was held at which said ordinance could be voted upon and approved or rejected by the electors of said city, was filed with the mayor thereof.

On December 20, 1907, relator, C. L. Wagner, was tried and found guilty of violating said ordinance, and adjudged to pay a fine and costs of the action. The relator refused to pay the fine, and for that reason was committed to the city jail by the respondent, George H. Brown, the marshal of said city, under a commitment issued by the police court on the judgment rendered against said relator. The relator alleges in his petition that ever since that date he has been restrained of his liberty under said commitment. Thereafter, on the 2d day of January, 1908, application was made to this court for a writ of *habeas corpus* for the purpose of determining whether or not he was lawfully restrained of his liberty, and the same was issued on said date, made returnable in the 11th day of January, 1908. The ordinance was in due form, and there is no allegation against its validity, but the contention is that by virtue of said petition filed for a referendum vote that the same was held in abeyance until the next city election. George H. Brown, marshal of said city, as respondent, made his return to said writ, showing that he held the relator under a commitment issued by the police court of said city on a judgment of conviction for the violation of said ordinance. The facts as heretofore set out were admitted on a hearing of this cause.

C. G. Horner and *P. S. Nagle,* for relator.

John T. Bradley, Jr., for respondent.

WILLIAMS, C. J. (after stating the facts as above). The question raised in this case is whether or not a petition demanding a referendum vote upon an ordinance duly passed by a city of the first class after the same had taken effect and was in force, such demand having been presented to and filed with the chief executive officer of such city after such ordinance had been published, suspends the force and effect of said ordinance until the next municipal election. Of course, the question necessarily arises as to whether or not the different sections in the constitution providing for the initiative and referendum are valid, and were in force and effect or self-executing on the 18th day of December, A. D. 1907, the date on which the petition demanding a referendum on said ordinance was filed with the mayor of the city of Kingfisher. The initiative and referendum provisions, relating, not only to the affairs of the state, but also to counties and cities, are taken substantially from the Constitution of Oregon. The Supreme Court of that state, in the case of *Kadderley v. Portland*, 44 Or. 119, 74 Pac. 720, 75 Pac. 222, has held that the same are not in conflict with section 4, art. 4, Const. U. S., guaranteeing to every state a republican form of government.

The next question is: Were said provisions self-executing on the 18th day of December, A. D. 1907? The Supreme Court of Oregon, in the case of *Stevens v. Benson* (Or.) 91 Pac. 577, held that the initiative and referendum provisions as contained in the Oregon Constitution were self-executing. The only difference between the provisions in that Constitution and those of this state is that in the former it is provided that, in submitting such petitions to the people, the Secretary of State and all other officers shall be guided by the general laws and the act submitting the initiative and referendum amendment to the people for adoption or rejection until legislation shall be especially provided therefor, clearly indicating that it was the intention in adopting the Oregon amendment that the same should then and there become self-executing. This clause does not appear in the Oklahoma Constitution. Substantially such provision was contained therein prior to the time that the constitutional convention reassembled after the proposed Constitution had been provided to be submitted to the people for adoption or rejection. When the convention reconvened, in order to obviate any possible objection that might be made by the President of the United States to the same, wherein is was required by section 4, art. 4, Const. U. S., and the terms of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) to be republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the Legislature to carry same into effect. There was undoubted wisdom and precaution in that act. If the enemies of the principle of the initiative and referendum in popular government had been able to convince the department of justice of the federal government that such provisions of the initiative, and referendum, when adopted by a state, rendered such state government unrepublican in form, still it remained that until the Legislature acted the principle was not self-executing in the Oklahoma Constitution. And, until the Legislature enacted measures carrying it into effect, the federal government had less right or reason to complain and that was one of the reasons for such action assigned at the time; for, if that contention against the provisions of the Constitution or to the initiative and referendum had been sustained, yet, as the same were not self-executing in that Constitution, reason and consideration of the rights of the people of the proposed state should certainly have impelled the promulgation of the proclamation of the admission of the state into the Union. For, when the act of the Legislature had been passed carrying same into effect, then the question could in due and proper time have been raised that such act was in conflict with section 4, art. 4, Const. U. S., and been declared void, and by such course preserved the supremacy of the Constitution of the United States, and at the same time vouchsafe the right of local self-government to over one million of citizens.

The Legislature carrying out the intention of the Constitutional convention with commendable fidelity, have enacted what is known as House Bill No. 174, entitled "An act to carry into effect the initiative and referendum powers reserved by the people in articles 5 and 18 of the Constitution of the state of Oklahoma, to regulate elections thereunder, and to punish violations thereof." (Sess. Laws 1907-8. p. 440), which was approved by the Governor on the 16th of April, A. D. 1908, thereby making absolutely complete and effective said provisions of said Constitution. See Reg. Sess. Laws Or. 1903, p. 244; Sess. Laws Or. 1907, p. 398. This is a very comprehensive act, providing fully for the forms of petition, both initiative and referendum, and for a review of the action of the Secretary of the State by the Supreme Court, whose judgment shall be final and binding upon such officer, and provisions in detail are contained for the holding of such election. Sections 17, 18, and 19 of the same act relate to municipalities. In said section 17 it is provided that in all cities, counties, and other municipalities which do not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the Constitution to the whole people thereof, as to their municipal legislation, the duties required of the Governor and Secretary of State by this act, as to state legislation, shall be performed as to such municipal legislation by the chief executive and the chief clerk of such municipality; and the duties required in this act of the Attorney General shall be performed by the attorney for the county, district, or other municipality.

In the case of *Taylor v. Hutchinson et al.*, 145 Ala. 207, 40 South. 109, the court says:

> "Our Constitution contains many instances of non-self-executing provisions. In these cases there is always some indication that something is left for the Legislature to do, or there is something in the nature of the provision that renders such legislation necessary."

In the case of *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626, discussing the question as to whether or not a provision of the Constitution of that state was self-executing, the court said:

> "The question in every case is whether the language of a Constitutional provision is addressed to the courts or the Legisla-

ture. Does it indicate that it was intended as a present enactment, complete in itself as definite legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined both from a consideration of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing."

See, also,*Acme Dairy v. City of Astoria* (Or.) 90 Pac. 153; *Swift & Co. v. City of Newport News,* 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404;*Logan et al v. Parish of Ouachita,* 105 La. 499, 29 South. 975.

Section 3, art. 5 Const. (Bunn's Ed. § 55), relating to the initiative and referendum provision, provides that "the Legislature shall make suitable provision for carrying into effect the provisions of this article." This especially indicates that it was not the intention of the constitutional convention that said articles should become effective until made so by act of the Legislature. In determining whether or not a provision of the Constitution is self-executing, we should consider the language in the light of the surrounding circumstances and conditions under which it was adopted with a view of ascertaining the intention of the parties framing it. We accordingly conclude that on the 18th day of December, A. D. 1907, the provisions in our Constitution relating to the initiative and referendum were not self-executing, and that they did not become effective until the 16th day of April, A. D. 1908, when the act of the Legislature herefore referred to was approved by the Governor of the state.

It is evident that if the provisions of article 5, relating to the initiative and referendum, were not self-executing on December 18, 1907, that section 4, art 18, was also not self-executing, and it results as a matter of course that the petition demanding a referendum vote on the ordinance, filed with the mayor of the city of Kingfisher on the 18th day of December, A. D. 1907, was without effect, and did not operate to supersede or suspend any ordinance. The fact that since said date the Legislature of this state has enacted a comprehensive and valid law carrying into effect all of the provisions of the initiative and referendum as reserved and contained in the Constitution could not give any validity to such petition, as that would have a retroactive effect or be in the nature of an *ex post facto* law.

Hence it is not necessary, in order to properly dispose of this case, to determine whether or not, after a city or municipality passes an ordinance and it becomes effective, a petition demanding the referendum on such ordinance thereafter being filed with the proper officer, in accordance with the charter or ordinance of said city, or with the general laws of the state, would have the effect to supersede or suspend the operation of such ordinance until the next municipal election. That question is not now properly before this court for determination; it being admitted that the ordinance under which the relator was prosecuted was properly enacted and published and otherwise valid. The only question before this court now is whether or not the demand for the referendum on such ordinance had the effect to supersede or suspend said ordinance. Having reached the conslusion that at the time such ordinance was passed and published the provisions in the Constitution relating to the initiative and referendum not being self-executing, although the same have since then been carried into effect by legislation, would not entitle the relator to the relief prayed for.

Writ of *habeas corpus* denied.

Turner and Dunn, JJ., concur; Kane and Hayes, JJ., concur in the conclusion denying the writ.

STATE V. JOHNSON.

No. 288. Opinion Filed May 6, 1908.

(96 Pac. 26.)

1. **COURTS—Appellate Jurisdiction—Submission by Governor to Supreme Court for Opinion—Conviction of Crime Requiring Punishment of Death.** Wilson's Rev. & Ann. St. 1903, sec. 5588, 5589, provide that, immediately after a conviction requiring a judgment of death, there

shall be transmitted to the Governor a statement of the conviction and judgment and of the testimony given at the trial, and that the Governor may thereupon require the opinion of the judges of the Supreme Court, or any of them, upon the statement so furnished. Held that, where such statement is submitted to the court for an opinion, the case is not in the Supreme Court as a suit upon which the judgment may be affirmed or reversed.

2. **PUNISHMENT—Murder—Plea of Guilty—Submission to Jury.** Under Wilson's Rev. & Ann. St. 1903, sec. 2174, providing that on an indictment for murder, where there is a plea of guilty, the court shall determine the punishment, it is the duty of the court on such a plea to fix the punishment, without submission of that question to the jury.

3. **SAME—Proceedings on Plea of Guilty—Irregularity.** Defendant in an indictment for murder, having refused to plead thereto, the clerk was instructed by the court to enter a plea of not guilty, whereupon both parties announced ready for trial, and a jury was duly impaneled, and the county attorney made his opening statement. Defendant's counsel then announced that defendant desired to plead guilty, and defendant, on inquiry by the court, stated that he wanted to plead guilty, and stated further to the jury that he did plead guilty. Thereupon the court instructed the jury to determine the punishment to be inflicted, and the verdict found the defendant guilty as charged, and fixed his punishment at death. No evidence was received as to his sanity, nor was he cautioned as to the effect of his plea. **Held,** that such proceedings were so irregular that it cannot be said that defendant was convicted according to law.

(Syllabus by the Court.)

Will Johnson pleaded guilty to an indictment for murder, and the trial judge certified a statement of the proceedings, conviction and judgment to the Governor, who submits the same to the Supreme Court for its opinion.

March 26, 1908, there was returned by the grand jury into the district court of Pottawatomie county, Okla., its indictment, wherein Will Johnson, the above- named defendant, was charged with the crime of murder, alleged to have been committed on the 23d day of January, 1908, upon the person of Mary Cuppy; defendant being charged with having beaten her to death with a piece of two-inch plank and an ax handle. Defendant was arrested on March 27, 1908, entered a plea of not guilty, and his case was set for trial on April 3, 1908. March 30, 1908, on it being made to appear to the court the defendant was without funds to employ counsel, the court appointed C. G. Pittman, an attorney of that bar, to defend him. April 4, 1908, the case not having come to trial, it was reset for April 6, 1908. Defendant withdrew his plea of not guilty, and his counsel filed a demurrer to the indictment, which was by the court overruled; no exception being saved thereto. On the same day defendant filed a motion for a continuance, setting up the fact that the indictment in the case was returned on the 26th day of March, 1908, and to that date to wit, April 6, 1908, "defendant has not had a reasonable time within which to prepare for trial, and at this time cannot safely proceed to trial for want of material testimony which he has been unable to procure." This motion was overruled, to which defendant reserved no exception. Thereupon he was again called upon by the court to plead to the indictment, and, refusing to do so, the clerk was by the court instructed to enter a plea of not guilty. Whereupon both parties announced ready for trial, and a jury was duly empaneled, and the county attorney, V. R. Biggers, Esq., made his opening statement. Whereupon the following proceedings took place:

"Mr. Pittman: The defendant at this time desires to withdraw his plea of not guilty, and enter a plea of guilty. Mr. Biggers: If the court please, I doubt—I would rather object to his withdrawing his plea at this time. Mr. Pittman: He disires to plead guilty at this time. The Court: Have the defendant stand up. What do you want to do in this case? Will Johnson: Plead guilty. The Court: Do you want to plead guilty to the jury? Will Johnson: Yes, sir. The Court: Do you want to state to the jury why you plead guilty to this charge? Will Johnson: Yes, sir. The Court: And you make your statement to jury what you want to do? Will Johnson: Sir? The Court: And you make your statement to the jury what you want to do? Will Johnson. Gentlemen of the jury, I plead guilty."

Thereupon the court delivered the following instructions to the jury:

"Gentlemen of the jury, this is an action wherein the state of Oklahoma prosecutes Will Johnson on a charge of murder, returned by the grand jurors of Pottawatomie county in the form of an indictment. The indictment has been read to you, and the opening statement of the counsel for the prosecution made, after which the defendant has in open court and to you entered a plea of guilty. You are instructed, gentlemen of the jury, that, the defendant having entered a plea of guilty of murder, there are two grades of punishment that may be inflicted: The first punishment is by death; the second is by confinement in the state penitentiary for life. It is now, gentlemen, for you to say by your verdict what the punishment shall be. Two forms of verdict will be handed to you—one imposing punishment by death, and the other imposing the punishment of life imprisonment in the state penitentiary. You will retire, gentlemen, and consider of your verdict. You are instructed that when you shall have retired to your jury room you will select one of your number as foreman, and when you have reached a verdict he will sign it as such and you will all return into court with it. You are instructed, further, that you must be unanimous in your conclusions. Unless you all agree, of course, no verdict can be returned. And now, the hour of 6:30 p. m. having arrived, court is adjourned until such time as the jury may agree upon a verdict."

The jury retired, and returned into the court its verdict, finding "the defendant, Will Johnson, guilty as charged in the indictment of murder, and fix his punishment at death."

Motion for new trial was filed for the following reasons:

"First, that said verdict is contrary to law; second, that said verdict is contrary to the evidence; third, that the court misdirected the jury in matters of law and fact arising during the course of the trial which were prejudicial to the substantial rights of the defendant."

Such motion was by the court overruled, to which defendant saved his exceptions. He thereafter filed his motion in arrest of judgment, which was likewise overruled, to which the defendant excepted. The said motions were both filed on April 7, 1908, and were considered by the court on the 14th day of April, 1908. Upon the overruling of the said motions the court, upon the consideration of the verdict rendered by the jury, pronounced its judgment and sentence as follows:

"It is therefore considered and ordered by the court that judgment be entered on the verdict of the jury in this case, and it is the judgment and sentence of this court that as a punishment of the crime which you have committed you be hanged by the neck until you are dead, and that your execution take place within the jailyard of the county jail of Pottawatomie county, state of Oklahoma, at eleven (11) o'clock in the forenoon on Friday, May 22, 1908."

On such sentence, Wilson's Revised & Annotated Statutes of 1903 of Oklahoma require (sections 5588 and 5589):

> "The judge of a court at which a conviction requiring a judgment of death is had must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial. The Governor may thereupon require the opinion of the judges of the Supreme Court or any of them upon the statement so furnished."

In accordance with this the clerk of the district court made a certified statement of the conviction and judgment and the proceedings had at the trial, and the judge of said court, Hon. W. N. Maben, transmitted the same to his excellency, Gov. C. N. Haskell, of the state of Oklahoma. In accordance with the terms of said statute, the Governor has required the opinion of the judges of the Supreme Court.

DUNN, J. (after stating the facts as above). Doubtless the purpose of the framers of the statute above quoted was to give the chief executive of the state proper information upon which to base his judgment upon an application for a pardon or a reprieve, and in addition thereto, and providing a further safeguard, by making it the duty of the judges of the Supreme Court, or any one of them to give their opinion for his guide and assistance to the end that so serious an act as the taking of a human life shall not occur without the same having the most deliberate and calm consideration of the highest executive and judicial officials of the state. The record before us, as is seen from the statement of facts and the recital of the manner and purpose for which it comes, is not filed as a suit in this court, upon which we would either affirm or reverse the judgment. It does not come in a manner required by law for such purposes. *Bailey et al. v. Territory of Oklahoma,* 9 Okla. 461, 60 Pac. 117 Yet we have given the same our most careful and attentive consideration, and we submit herewith for the consideration of his excellency, the Governor, the judicial and legislative expressions which have been uttered by other courts, text-writers and states dealing with judicial admissions in cases of this grave character.

Greenleaf on Evidence, vol. 1 § 216, states the rule which seems to be followed very generally by most of the courts in cases of judicial confessions or admissions such as the one at the bar. It is as follows:

"Confessions are divided into two classes, namely ,judicial and extrajudicial. Judicial confessions are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature of the consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate pursuant to statutes, and the plea of 'guilty' made in open court to an indictment. Either of these is sufficient to found a conviction, even if to be followed by a sentence of death; they being deliberately made, under the deepest solemnities, with the advice of counsel, and the protecting caution and oversight of the judge."

Bishop's New Criminal Procedure, vol. 1 § 795, is as follows:

"Undoubtedly a prisoner of competent understanding, duly enlightened, has the right to plead guilty, instead of denying the charge. Yet in proportion to the gravity of the consequence the court should exercise caution in receiving this plea. Thus, where one tendered it in a capital case, the judges would not accept it till they had explained to him its serious nature, sent him back to his cell for reflection, brought him back again into court, had the indictment read to him a second time, and examined witnesses as to his sanity, and whether or not promises of clemency had been made to him. These steps are not in form taken in all cases, but they illustrate an ever-present caution. And in some of the states there are varying statutory and other like devices to protect defendants from improvident pleas of guilty."

An inspection of the case of *Commonwealth v. Battis*, 1 Mass. 94, cited by Mr. Bishop in support of his text, shows that the defendant was a negro, who was indicted for the murder of a white girl of about 13 years of age. On being brought before the court, he pleaded guilty, whereupon the following proceedings were had:

"The court informed him of the consequence of his plea, and that he was under no legal or moral obligation to plead guilty, but that he had a right to deny the several charges, and put the government to the proof of them. He would not retract his pleas, whereupon the court told him that they would allow him a reasonable time to consider of what had been said to him and remanded him to prison. They directed the clerk not to record his pleas at present. In the afternoon of the same day the prisoner was again set to the bar, and the indictment for murder was once more read to him. He again pleaded guilty. Upon which the court examined, under oath, the sheriff, the jailer, and the justice (before whom the examination of the prisoner was had previous to his commitment) as to the sanity of the prisoner, and whether there had not been tampering with him, either by promises or persuasions, or hopes of pardon, if he would plead guilty. On a very full inquiry, nothing of that kind appearing, the prisoner was again remanded, and the clerk directed to record the plea on both indictments."

Another case, *Territory v. Miller*, 4 Dak. 173, 29 N. W. 7, was one where the defendant pleaded guilty of murder, and the following quotation from the opinion shows the caution and care exercised by the court before passing sentence:

"The court thereupon carefully warned and admonished him of the solemn consequences of such plea, and that it would be a plea of guilty of murder, and would be so entered, and not, as insisted by his counsel, a plea of some lesser crime, and further informed him that if he pleaded not guilty he could have the facts passed upon by a jury, who might find him guilty only of the lesser offense, or not guilty of any offense. The defendant's counsel excepted to these admonitions, and, upon the court asking defendant whether he pleaded guilty or not guilty to the charge of murder as charged in the indictment, insisted that the court should ask the defendant whether he pleaded guilty or not guilty. The court, however, renewed the interrogatory, 'do you plead guilty or not guilty to the charge of murder as charged in the indictment?' to which defendant replied, 'Guilty.' The court thereupon directed that the plea of guilty be entered to the charge of murder as set out in the indictment. Upon the suggestion of the district attorney, and against the objection of the defendant's counsel, the court subsequently, in the presence of the defendant and his counsel, and before proceeding to judgment, examined several witnesses for the purpose of informing itself as to the nature and circumstances of the offense, from all which it appeared, as, indeed, was freely admitted, both then and upon the argument in this court, that the crime was one of very great atrocity; the defendant having confessed, and being abundantly corroborated by other evidence, that during the temporary absence of his employer he had murdered his wife and infant son with an ax after they had retired to bed, and that the motive of the crime was the plunder of the cash box kept in Mrs. Snell's bed room."

Another case of the same class and character is *People v. Lennox,* 67 Cal. 113, 7 Pac. 260, wherein it will be observed that the court, upon a plea of guilty in a case of this character, examined 30 witnesses to ascertain the grade of the offense:

"The defendant pleaded guilty. Thereupon the court proceeded to hear evidence for the purpose of fixing the degree of the crime. Witnesses were examined, as well those offered by the defendant as for the prosecution—some 30 in all. After hearing the evidence, the court fixed the degree of the crime to be murder in the first degree, and set September 11, 1884, as the day on which the punishment should be determined. On that day the court, referring to section 190 of the Penal Code and to the testimony which had been taken, declared to the defendant that the discretion to be exercised by the court as to whether the punishment should be death or imprisonment for life was the same as that 'from the evidence in this case I can find no circumstances that' from the evidence in this case I can find no circumstances of mitigation, but many of aggravation. The fact that your passions were inflamed with strong drink can furnish no extenuation. I must therefore adjudge that you be taken hence by the sheriff of this county to its county jail, where you will be by him retainea until at a time and place to be hereinafter determined by the court you will be hanged by the neck until you are dead.' "

A rather unusual case from Illinois (*Gardner v. State,* 106 Ill. 76) was one wherein a German, unfamiliar with the English language, was charged with murdering a woman at whose house he was stopping. On being brought before the court, and without counsel assigned him, he pleaded guilty to the charge. The court thereupon interrogated him and examined him through an interpreter accepted his plea of guilty and sentenced him to be hanged. The Supreme Court on this matter said:

> "We have no doubt the accused understood that he was charged with the killing of the deceased, and also that he did not wish to deny that fact; yet at the same time we think it highly improbable that he understood the difference between a charge of murder and a mere charge of taking life, or that one might be proved guilty of killing another and yet not be guilty of any offense at all, or at least of the offense of murder. Even admitting the court would be justifiable in entering a plea of guilty upon admissions thus obtained (which we have just seen it would not), it is clear the admission of the accused in this case that he killed the deceased, without a more satisfactory account of the attending circumstances, was not sufficient to authorize the entry of that plea. The killing, as is well understood, standing alone, does not constitute the crime of murder, but rather a single link in the chain of testimony to establish that crime."

In another case, which arose in Missouri (*State v. Stephens,* 71 Mo. 535), the court speaking through Sherwood, C. J., quotes with approval the following from some of the older authorities upon the care and regard that should be had by the trial court in acting upon a plea of guilty by a defendant in felony cases:

> "Courts have always been accustomed to exercise a great degree of care, in receiving pleas of guilty in prosecutions for felonies, to see that the prisoner has not made his plea by being misled, or under misapprehension or the like. Thus it is said by Archbold in regard to the point being discussed: 'If, instead of pleading not guilty, the defendant says that he is guilty, this is a confession of the offense, which subjects him precisely to the same punishment as if he were tried and found guilty by verdict. But as defendants often imagine that, by pleading guilty, they are likely to receive some favor from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprises them that their pleading guilty will make no alteration in their punishment. If, however, they still persist in their plea of guilty, it is then recorded.' etc. 2 Archb. 334. And Hawkins says: 'Where a person, upon his arraignment , actually confesses himself guilty, or unadvisedly dis-

close the special manner of the fact, supposing that it did not amount to felony, where it doth, yet the judge upon probable circumstances that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession and suffer the party to plead not guilty.' 2 Hawk. P. C. 469."

The danger of a court without due consideration passing upon a plea of guilty and rendering a judgment thereon was conceived by legislatures of at least two states in the Union, Michigan andTexas, to be so great that they passed special statutes regulating the attention that should be given by the court to this matter. Section 9558, 2 How. Ann. St. Mich., is as follows:

"The people of the state of Michigan enact, that whenever any person shall plead guilty to an information filed against him in any circuit court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied, after such investigation as he may deem necessary for that purpose, respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered, and order a trial of the issue thus formed."

The Texas statute is found under articles 554 and 555 of their criminal procedure act, as follows:

"If the defendant plead guilty he shall be admonished by the court of the consequences; and no such plea shall be received unless it plainly appear that he is sane, and is uninfluenced by any consideration of fear, by any persuasion, or delusive hope of pardon prompting him to confess his guilt. Where a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, and beyond the discretion of the jury to graduate in any manner, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon."

And wherever the trial courts in these states have to any extent departed from these provisions the reported cases we have examined show the appellate courts have reversed the causes and remanded them for trial. We have no such statute to control the discretion of the courts in this state, but the authorities above cited are sufficient to indicate the policy of the law in the absence of such direct requirements.

In his letter transmitting this record Judge Maben states:

> "I am able to send you a full statement of the case and all of the proceedings; but there is no evidence, for the reason that the defendant, after a jury had been selected, entered a plea of guilty, or a judicial confession, to the jury."

The record before us does not disclose that the plea in this case was offered and accepted, as indicated in the language of Mr. Greenleaf, "under the deepest solemnities, with the advice of counsel, and the protecting caution and oversight of the judge," nor with the high degree of care and caution required, as indicated by Mr. Bishop, "in proportion to the gravity of the consequences."

St. Okla. par. 2174, § 255, under the head of "Crimes and Punishments," provides:

> "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the territorial penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same."

It will be observed in the case at bar that the defendant stated to the jury. "Gentlemen of the jury, I plead guilty;" that this was the only statement which the jury had upon which to predicate its verdict; that upon this, and this alone, it found defendant guilty and fixed his punishment at death; and the court, in rendering its judgment, based it, not upon the plea, but upon the verdict of the jury. It will be observed from the statute that upon a plea of guilty the court, and not the jury, shall determine the punishment. The function of the jury is to find from the evidence and facts adduced before it the final conclusion of guilt or innocence; but when the prosecution asserts guilt, and the defendant admits it, and his admission is accepted, there is no duty for a jury. Its function is over. Then it is the duty of the court attaches. And now this record is before us, and we are called on to say whether or not the formalities of the law essential to the taking of human life have been observed.

We have no power to reverse this judgment, as no cause is before us, but we are of the opinion that there are such irregularities disclosed by the record that we cannot say that the defendant was convicted according to the forms of law.

All the Justices concur.

STATE *ex rel.* STEVENSON v. RUSSELL, *Judge.*

No. 168. Opinion Filed May 13, 1908.

(95 Pac. 463.)

1. **MANDAMUS—When Lies.** The writ of mandamus will not lie except to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.
2. **SAME—To Judge—Admission to Bail—Records.** The writ of mandamus will not lie to compel a district judge to enter of record in the district court of a certain county in his district an alleged order admitting defendant to bail where it appears that the same is not there properly entitled to record.

(Syllabus by the Court.)

Application by the state, on the relation of James Stevenson, for writ of mandamus to S. H. Russell, judge of the district court of Carter county. Writ denied.

Pruiett, Cardwell & Sniggs. for relator.

S. H. Russell, pro se.

TURNER, J. On February 19, 1908, the petitioner, James Stevenson, brought an original proceeding in this court for a writ of *habeas corpus* to secure his release from custody on bail. The petitioner urged two grounds on which he claimed his right to the writ; the first being that after his indictment for a capital offense he applied to the Honorable Hosea Townsend, who at that time was judge of the United States Court for the Southern District of the Indian Territory, for bail. and that said judge admitted the petitioner to bail in the sum of $5,000 and that after the transition of said court into the district court of the state of Oklahoma the said court of said district refused to admit the petitioner to bail under said order. That petitioner thereafter applied to the Honorable R. McMillan, judge of the Fourteenth judicial district of the state of Oklahoma, to be admitted to bail, and a hearing of said application was had; that upon considering the testimony the said judge of said court committed the petitioner to the common jail of Cleveland county to be held upon said indictment without bail; that said restraint was illegal; that petitioner was not guilty of the crime of murder or any crime, and the proof of guilt was not evident, nor the presumption thereof great. An alleged copy of which said order was filed with his said petition. His contention was that said order admitting him to bail was *res adjudicata* as to his right thereto. But it appeared on that application that no order granting bail was ever entered of record on the journal of either the United States Court for the Southern district of the Indian Territory or the said district court of Carter county, Okla., or, indeed, of any court whatever, and for that reason the writ of *habeas corpus* was denied.

This is an original application for a writ of mandamus filed herein on April 22, 1908, by said petitioner to require the Honorable Stilwell H. Russell, judge of the district court of Carter county, to pass judgment upon an application to supply the record in said cause and have said order entered therein, a copy of which is alleged by petitioner to have been presented to him as an exhibit to said petition, and which it is alleged he refused to do or consider. On April 30, 1908, respondent filed answer to the alternative writ of mandamus issued herein. and the cause came on for hearing upon an agreed statement of facts. During the hearing it developed that the alleged original order of Judge Townsend admitting defendant to bail in the sum of $5,000 was on file in this court with petitioner's application for bail aforesaid, but had never been entered of record, either in the district court of Carter county or in the district court of Mc-

Lain county where the indictment is pending, or anywhere else, so far as this court is advised. It does not clearly appear to this court from the testimony submitted on this application whether this alleged order was made as a court order or a chambers order by Judge Townsend at Ardmore; but from the face of a copy of the alleged order it appears to be a court order made by him at Purcell.

The court is therefore of the opinion that said order is in no event properly admissible of record in the district court of Carter county, and for that reason the peremptory writ of mandamus in this case is refused.

All the Justices concur.

DRIGGERS V. UNITED STATES.

No. 675, Ind. T. Opinion Filed May 13, 1908.

(95 Pac. 612.)

1. **CONSPIRACY—Evidence—Acts and Statements Prior to Formation.** Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements of one of the defendants, prior to the formation of the conspiracy, are inadmissible as evidence against others.

2. **WITNESS—Impeachment—Prior Consistent Statement.** It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed.

3. **EVIDENCE—Hearsay—Former Evidence—Death of Witness.** Proof of the return of an officer on a subpoena that the witness is dead, the same not being authorized or required by law, and by the oral evidence of witnesses that they had been informed of his death, is insufficient to establish this as a fact to render competent in a final trial the testimony of such witness taken and transcribed at the preliminary examination.

4. **ACCOMPLICE—Instruction—Question for Jury.** Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under Mansf. Dig. sec. 2259 (Ind. T. Ann. St. 1899, sec. 1602). a conviction cannot be had on the testimony of an accomplice unless corroborated was sufficient, and it was not error not to further charge that a certain witness was an accomplice. If defendant regards the word "accomplice" as a technical one requiring a definition by the court, he should so request, but not ask an instruction that a certain witness is an accomplice; that being a question for the jury.

5. **HOMICIDE—Instruction—"Mutual Combat."** A charge that if defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of defendant, and the defendant. knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, going to the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder, was not, under the theory of the prosecution and the evidence in this case, erroneous.

(Syllabus by the Court.)

Appeal from the United States Court for the Southern District of the Indian Territory, at Pauls Valley; J. T. Dickerson, Judge.

B. F. Driggers was convicted of murder, and brings error. Reversed and remanded.

October 3, 1903, the grand jury of the United States Court for the Southern District of Indian Territory returned its indictment, charging B. F. Driggers, Tom McCarter, John Underwood, and Ted Bennett, with the murder of Robert G. Brady, and L. W. Goff as a principal, in the second degree as to each of them. Goff was paced on trial at Ada; and after his conviction, the venue was changed, for the trial of the other defendants, to Pauls Valley, at which place the appellant in this case was placed on trial, in June, 1905, and the jury returned a verdict finding him guilty in the manner and form charged, without capital punishment. A motion for a new trial was filed and overruled, the defendant saving his exception, and the case was taken to the United States Court of Appeals of Indian Territory by writ of error. On September 26, 1905, that court affirmed the judgment of the lower court. *Driggers v. U. S.* 104 S. W. 1166. A petition for rehearing was filed, which was pending at the time Indian Territory was admitted as a state, and the case is in this court by virtue of the terms of the enabling act.

On the consideration of the petition for rehearing this court granted it, and on the hearing on the merits of the case the Attorney General, represented by Hon. W. A. Ledbetter, filed his answer to the contentions of the appellant, and admitted error in the record sufficient to require us to reverse the prior decision rendered herein. He admitted that the admission of the testimony of the witnesses Rhea and Saddler was erroneous, and then said: "There are other errors in the case, which will doubtless receive the attention of the court." In view of the fact that we concur in the conclusion reached by the Attorney General's office, it will be unnecessary for us to discuss in detail and at length many of the propositions urged upon the attention and considered by Mr. Justice Clayton, who wrote the opinion for the United States Court of Appeals of Indian Territory, but will confine our discussion to those matters which, at the trial of the case anew, will probably arise again.

The scene of the homicide was a farm, located near the little town of Jesse, in the Chickasaw Nation in Indian Territory, An Indian woman by the name of Colbert owned this land, which she had leased to a merchant by the name of McNeal. He, in turn, had rented the place, for the year 1902, to one of the defendants named in the indictment (Goff) and a man by the name of Riley. A crop of cotton had been raised on one part of the land, and a crop of corn on the other, the two crops joining, but without any fence or other division between them. Driggers, the defendant, who lived in that neighborhood, some time in the month of October, 1902, bought the right to run his stock in the cornfield after the corn was gathered, paying therefor the sum of $50. Riley and Goff had not picked their entire crop of cotton; and, there being no fence between the cornfield and the unpicked cotton, the defendant Driggers did not turn his cattle in, under an agreement with his vendors that they would protect him and see that he was permitted to turn in after the cotton crop was gathered. Goff claimed that he had rented the land from McNeal for the year 1903, and it was under this asserted right of his that he agreed that Driggers might have the benefit of the stock field, notwithstanding the fact that the cotton crop was not all gathered at the end of December, 1902. McNeal testified that he had not rented to Goff, but the evidence shows that if he had, he changed his mind, and rented the land to Robert G. Brady, the deceased, who was living in that neighborhood, running cattle, and who, desiring to use the stock field, the day before the homicide, started to run a fence across the land dividing the cotton field from the stock field, so that his cattle might run therein without interfering with the unpicked cotton crop. While he was engaged with his hands in the construction of this fence, Goff came to him in the afternoon, and, according to the testimony of Kelley, said to Brady:

> " 'What the hell are you doing here? This is my land.' I told him McNeal had rented the place to Brady. I walked on down the line a piece, and walked on up to where Brady was. Goff, it seems to me, stayed there a while, and went back and came back with an Indian, Tom Mc Carter [who was a son-in-law of the woman who owned the land.] Q. What was then said? A. Well, there wasn't a great deal said, more than Brady told him. He says he didn't want to hear any more of his noise. He [Goff] said: 'If you put any cattle in here'—I understood him to say he would kill the cattle As we started away, he said: 'If you put any cattle in here, I will kill you.' He stood there and talked, and he says: 'Put them in, and I will be with you, God damn you.' Brady didn't seem to pay any attention to him."

This testimony was offered on the theory that a conspiracy had been formed between Goff and the defendant McCarter, which was subsequently joined by Driggers, and that it was admissible, as against Driggers by virtue of this fact. It was objected to on the part of the defendant, and its admission is assigned as one of the errors. Goff immediately went down to where Driggers lived for the purpose of informing him of the presence of Brady on the land, of the adverse claim, and the building of the fence. Driggers was not at home, but returned that night about 10 or 11 o'clock, and then learned that Brady was going to turn cattle in the cornfield. During the rest of that evening, and that night, the defendants here gathered together Winchesters and shotguns and ammunition, and arming themselves with them, appeared next morning inside the field, along the highway where it was expected Brady would drive his cattle near to turn them in. Driggers testified that he and Kelley were enemies, and that he expected that he would accompany Brady when he came with the cattle; that he expected to drive them out if they were turned in; that his presence and purpose in going to the field with the parties named, armed as they were, was that he believed that when Brady saw they were there, he would not come up; that he supposes that he was there to resist any trouble that Kelly would bring about, and that he thought he would keep the cattle out. On the morning of the difficulty a man by the name of French Curtiss came down, ahead of the Brady party, in a wagon, with some wire and posts for the purpose of completing the wire fence; and on arriving at a point in the road near where Driggers and Goff and the other parties stood inside the field, and on the south side of the cross-fence, Goff told him to go back, and to get back quick. Curtiss testified that Driggers told him to go back and to tell them not to bring the cattle there. A short time after Curtiss turned back, the cattle were driven down the road by Brady, Kelley, and two brothers by the name of Saddler. Across the road, and nearly opposite the place where the defendants stood on the inside of the field, was a farm inclosed in a wire fence, the gate to which was either open or down, and when the cattle came opposite this point, some of them ran into the inclosure. The deceased, turning his horse out of the highway, ran in and drove these cattle out, crossed the road, and stopped near the Driggers party, got down from his horse, and, according to the evidence of the prosecution, began to arrange his saddle blanket, or at least handle his saddle, and it is at this time, it is asserted, without any overt act on his part, he was fired upon by the party with which defendant was connected, fell to the ground,arose, staggered or ran across the highway, and fell lifeless. Kelley, who had not dismounted, was also fired upon, receiving wounds, and his horse was killed. The Saddler boys both retreated. According to the testimony of the defendant, Brady rode up within four or five feet of the fence near where Driggers stood, got down off his horse, pulled up the knee wire of the wire fence about 2½ feet, took hold of the post, when defendant said: "Brady, don't you pull that fence down." He jerked the fence down and ran backwards, grabbed for his gun and jerked at the fence all at the same time, and ran backwards, trying to get his gun; pulled it out, so that defendant saw it, who told him not to pull it. That he then shot him, or shot at him, with a No. 12 shotgun, loaded with B. B. shot, when he was about 12 or 15 feet from the fence. That he then shot at Kelley, whose horse fell with him across the road near the other fence.

The witness Tom McCarter, who was jointly indicted with Driggers, but who was offered as a witness on the part of the government, testified that at the time Brady got on the ground, and about the time the shooting commenced, he heard Driggers say to him: "Brady, don't you do that." Kelley, who was placed on the stand as a witness for the government, testified:

> "When Brady came out of the gate with those cattle, he rode in a northwest direction in the middle of the lane, and got off of his horse in the neighborhood of the middle of the lane. I had stopped, was simply moving a little at this time, on the right of Brady. I was watching to see what he was doing, and to see what these parties were doing. And he kind of put his hand on the saddle, just as though he was going to pull the saddle up, and raised his head to look. That was the first time he looked towards them. And Driggers shot."

Contradicting and impeaching Kelley and the testimony which he gave in reference to what Brady was doing at the time the shooting was done, the defendant introduced a witness by the name of Boatright. who testified that, on the same day of the shooting. at his home Kelley stated that Brady got off his horse, and went over and took hold of the fence post, and that Driggers shot him. The government then, for the purpose of supporting Kelley and his testimony, and to show that the statement which he had made on the witness stand was in consonance with previous statements which he had made concerning the same matter, consistent with his evidence, introduced witness Rhea, who had a talk with Kelley, the Defendant, after he was wounded, concerning these matters. He testified that: "Kelley at the time did not say anything about the fence any more than Brady went inside the fence and drove some cattle out, came out, and got down off his horse, pulled his saddle up, and as he turned his head, the shooting commenced." To this testimony of Rhea the defendant objected and excepted, and that it is error is most strenuously insisted.

On the preliminary examination which took place before a United States Commissioner, Jim Saddler, one of the parties who accompanied Brady to the scene of the homicide, testified concerning the affray. It is not necessary for the purpose of this case to recite his testimony here, but it was most material, and in many ways in conflict with the evidence of the defendant. On the trial of the cause he was not present, but the government introduced his written evidence as transcribed by the commissioner, upon a showing that by general report Saddler was dead, one witness testifying that his wife told him that her husband was dead; and the return of the subpoena, which was issued for him, made by the marshal who sought to serve it, while not appearing in the record, is conceded to have been by both parties, returned that he was dead. The record is voluminous, a great unmber of witnesses being introduced, and a great amount of evidence being offered, but the foregoing statement of facts is sufficient for the purpose of this opinion.

H. M. Carr, Crawford & *McKeown, Cruce,* & *Cruce, Moman Pruiett,* and *Potter, Bowman* & *Potter,* for appellant.

Charles J. West, Attorney General, and *W. A. Ledbetter, Assistant Attorney General,* for the State.

DUNN, J. (after stating the facts as above): From the conclusion to which the court has come, that it will be necessary to reverse the case and grant to defendant a new trial, we will note the assignments of error only which in the new trial granted will be liable to again arise.

The first and second assignments of error, made by appellant, are the usual ones, that the verdict was contrary to the law and the evidence. The third assignment of error is an averment that:

> "The court erred in permitting the government witness, Kelley, to testify, over the objection of defendant, to a conversation between the deceased, Brady, and one Goff, on the day before the difficulty, because the defendant was not present at such conversation, and because no conspiracy is shown to have existed at that time between the said Goff and the defendant, and the said testimony was purely hearsay."

This evidence was admitted by the court under the theory that a conspiracy existed between Goff, McCarter, and the defendant, or between Goff and McCarter, and afterward joined by Driggers, at the time these utterances were made. Under no other theory could this evidence have been admitted. The rule is as well established as any other that, after a conspiracy has once been formed, whether to bring about and effect the purpose finally accomplished or not, evidence of acts and expressions of one of the co-conspirators is admissible against the others, whether the conspirator against whom it is introduced was present or not. This, under the view taken by the authorities that, when a conspiracy is created, the parties so agreeing constitute a separate and distinct individuality, and that the act of one is the act of all, and that the expression of one is the expression of all made in pursuance of the conspiracy. Greenleaf on Evidence, vol. 3, § 94. When evidence is offered of an act or conversation of a party in his absence, who is charged with being a party to a conspiracy, the primary question to be determined is, whether or not the conspiracy had been formed at the time, or had the conspiracy ceased. If it had not been formed, or if it had ceased, then the act or statement is inadmissible. In the case of *People v. Kief*, 126 N. Y. 661, 27 N. E. 556, the rule is laid down in the following language.

> "Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements were in furtherance of the common design. The acts or statements of one of the defendants prior to the formation of the conspiracy, or subsequent to its termination by the accomplishment of the common purpose, or by abandonment, are inadmissible as evidence against the others."

The evidence of which complaint is made is the statement Goff made to Brady the day before the shooting, when Brady was on the land constructing a fence, when Goff said to him: "If you put any cattle in here I will kill you"—this being further connected with the offense by Goff's statement to Brady at the time of the shooting, when he said, with an oath: "I told you the other day that I would kill you." The evidence of the relationship between these parties is set out in the statement of facts, and we submit that under it there must be great doubt as to whether or not the conspiracy was formed at the time Goff used that language. It is true, if one had been formed, and Driggers joined it afterwards, his joining it would be an adoption by him of the things done or said by the others in furtherance of the general plan formed prior to his joining it. *State v. May,* 142 Mo. 135, 43 S. W. 637. Whether there is any evidence of a conspiracy is primarily a question to the court. There must be some tangible material evidence of the conspiracy or a promise of its production, before a court can properly admit evidence of statements made in the absence of the party against whom they are used, when he, in fact, was not present, and knew nothing of them. This evidence need not be direct and positive or conclusive, in fact, but there should be some, and it is for the court to say, in the first instance, whether or not it exists. This does not apply, of course, where it is sought to show, by the very language itself, that it was a part of the formation of the conspiracy. Goff testified that he had rented this place for the year 1903, and that he was entitled to the possession of it. There is nothing in the record to show that at the time Brady started to run his cross-fence over this land, either Goff or Driggers or Tom McCarter or any of the other parties had any prior information that such was his intention. The fence was well under way when Goff discovered it, and, going over to where the work was going on, forbade continuance of it, He then left and returned, Tom McCarter accompanying him. There is no evidence from either McCarter or Goff or from any other source, as to why they went back, or what their purpose was. Goff again continued the conversation that he had begun before. McCarter said nothing, taking no part in the conversation, nor doing any act which would show that there was any concert of action whatever between them or of any formation of a conspiracy. He was simply present. He said nothing. He did nothing. Certainly Goff could not form a conspiracy with himself. It might be asked why McCarter went over there with Goff, what his purpose was, if it were not the beginning of a conspiracy? We cannot say what his purpose was. We do not know. There is no evidence in the record to show. He was living on the place. It belonged to his mother-in-law, and this, in our judgment, is clearly as strong and pertinent a reason as the one ascribed to it by the district attorney, and is more in consonance with the strict policy of the law, which presumes innocence and not guilt. It is true that immediately after this took place, Goff went to Driggers' house. McCarter immediately began to take action to get ammunition and a gun, and that as soon as Driggers returned home, and on being informed of the circumstances, he likewise began to make preparations for the affray, but to us it seems more reasonable to conclude from the evidence that these acts were simply carrying out the purpose of the threat made by Goff, and the intent then formed, than was the threat part of a conspiracy formed prior to its being spoken. There is evidence of the conspiracy being formed immediately afterward. We cannot find any evidence that it was formed before. Hence we hold that this admission of the statement of Goff to Brady in the absence of Driggers was prior to any conspiracy formed and, it not being shown that he consented or assented thereto, was erroneous.

The fourth assignment of error raises the question of the admissibility of the evidence of Rhea, which was offered to support the testimony given by Kelley when it was sought to impeach him by Boatright, who testified, in reference to the statements made by Kelley, contrary to those which he had given upon the witness stand. In view of the contrariety of opinion existing among the text-writers and judicial expressions of the courts of the United States, and in view of the further fact that this question is a new one in this jurisdiction, have combined to impel us to give it a more extended examination than we otherwise should. It is the contention of the defendant that this was prejudicial error, and he cites a number of authorities to sustain his position. The theory adopted by some of the states in admitting this testimony is that, the credibility of the witness being impeached or assailed by proof of contrary statements made out of court, the witness may support his evidence, and his credibility is sustained by showing his consistent statements, made at or about the time when it is alleged the prior inconsistent statement was made; and some of the courts, unreservedly and without qualification, adhere to the doctrine that this evidence is admissible. Others hold that it is admissible under any circumstances, while others, with another line of authorities, and in our judgment by far the greater weight and number, hold that where it is attempted to be shown that the statement on the stand is a late fabrication, brought about by the changed situation of the witness to the case or the parties to it, or because of a motive recently formed, then the evidence of prior statements, consistent with those made on the stand under oath, is properly admitted. The states which hold broadly and without qualification that such evidence is admissible appear to be the following: Texas, North Carolina, Missouri, and Indiana. The decisions of the courts of these states, which we have examined, and in which it is so held, are as follows: *Jones v. State,* 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719;

Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294; *Lee v. State,* 44 Tex. Cr. R. 460, 72 S. W. 195; *State v. Exum,* 138 N. C. 599, 50 S. E. 283; *State v. Grant,* 79 Mo. 113, 49 Am. Rep. 218; *Hicks v. State,* 165 Ind. 440, 75 N. E. 641. The rule generally adopted in those states is expressed by the Supreme Court of Indiana, in the case of *Hicks v.State, supra,* in the following language:

"Where a witness is impeached by evidence of contradictory statements,. he may be supported by corroborating statements made at about the same time as the alleged contradictory statements."

On the other hand, the following states seem to hold squarely againse the admissibility of such testimony under any circumstances: Mississippi, Maine, Iowa, Georgia, Colorado, and Alabama. The cases decided by these courts, which sustain this doctrine, and which we have examined, are as follows: *Head v. State,* 44 Miss. 731; *Ware v. Ware,* 8 Me. 42 (This was a case decided in 1834, and our researches do not disclose that the rule has been changed); *State v. Porter,* 74 Iowa, 623, 38 N. W. 514; *Cook v. State,* 124 Ga. 653, 53 S. E. 104 (but, in this connection, see the case of *Sweeney v. Sweeney,* 121 Ga. 293, 48 S. E. 984); *Davis v. Graham,* 2 Colo. App. 210, 29 Pac. 1007. In this case it will be noted, however, that there is a limitation placed upon the rule, which is that statements, made after the alleged contradictory matter, are not admissible. *Sonneborn v. Bernstein,* 49 Ala. 168. This case expresses the earlier doctrine of Alabama, and went to the extraordinary extent of holding that where a witness was impeached, not by proof of the contradictory statements made by him, but by showing that his general character for truth was bad, even under these conditions he may be supported, or his testimony may be corroborated by showing that, prior to the commencement of the action he made statements out of court, uniform and consistent with his testimony in court. This doctrine, however, was directly overruled, and the case went with it, in *McKelton v. State,* 86 Ala. 594, 6 South. 301, in which the court said:

"A witness having been impeached by proof of contradictory statements made by him on the preliminary examination of the defendant before a committing magistrate, it is not permissible to sustain or corroborate him by proving that, just before his examination as a witness on that occasion, he made statements to the magistrate in substance the same as his testimony on the trial."

The view entertained on this question in that state is further complicated by the holding in the case of *Nichols v. Stewart,* 20 Ala. 358: "Proof of declarations, verbal or written, made by a witness out of court, is, as a general rule, inadmissible in corroboration of testimony given by him on the trial of a cause"—this case being one in which the testimony of a witness was contradicted by showing contrary statements out of court but it was allowed to be corroborated by evidence of prior consistent declarations. These different divergent opinions, cited from the Alabama court, are given to show how mixed some of the courts are on the propositions, but Alabama is not alone. Other states have made holdings practically as conflicting. The rule generally adopted in the above states is expressed by the Supreme Court of Mississippi in the case of *Head v. State, supra,* in the following language:

> " To discredit a witness it is competent that he had made discordant statements at other times and places; but to re-establish his credibility, or to support what he has deposed on the trial, it is inadmissible to prove that he has made the same statements to third persons."

We now come to a consideration of the authorities which aver the rule so well expressed by the Tennessee Supreme Court in the case of *Legere v. State,* 111 Tenn. 368, 77 S. W. 1059, 102 Am. St. 781, that we adopt its language for our expression of the same:

> "It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions, consistent with his evidence, are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed."

Arrayed in support of the doctrine declared by the court will be found the Supreme Court of the United States, Arkansas, California, Kansas, Illinois, Louisiana, Michigan, Massachusetts. New Hampshire, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, and Washington. The cases examined, in which the appellate tribunals of the United States and the states named have adhered to the rule last declared are as follows: *Ellicott and Meredith v. Pearl,* 10 Pet. 412, 9 L. Ed. 475. Ark: *Burks v. State,* 78 Ark. 271, 93 S. W. 983. California: *Barkley v. Copeland,* 74, Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; *People v. Turner,* 1 Cal. App. 420, 82 Pac. 397. Illinois: *Chicago Railway Co. v. Matthieson,* 212 Ill. 292, 72 N. E. 443; *Id.,* 113 Ill. App. 246. Kansas: *County Commissioners v. Vickers,* 62 Kan. 25, 61 Pac. 391; *State v. Petty,* 21 Kan. 54; *State v. Hendricks,* 32 Kan. 559, 4 Pac. 1050. Louisiana: *State v. Waggoner,* 39 La. Ann. 919, 3 South. 119. Michigan: *Stewart v. People,* 23 Mich. 63, 9 Am. Rep. 78. Massachusetts: *Commonwealth v. Jenkins,* 10 Gray, 485. New Hampshire: *Reed v. Spaulding,* 42 N. H. 114. New York: *Robb v. Hackley & Welton,* 23 Wend. 50. North Carolina: *Wallace v. Grizzard,* 114 N. C. 488, 19 S. E. 760. Pennsylvania: *Commonwealth v. Brown,* 23 Pa. Super Ct. 470; *Crooks v. Bunn,* 136 Pa. 368, 20 Atl. 529. South Carolina: *State v. McDaniel,* 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661. South Dakota: *State v. Caddy,* 15 S. D. 167, 87 N. W. 927, 91 Am. St. Rep. 666. Tennessee: *Glass v. Bennett,* 89 Tenn. 478, 14 S. W. 1085. Vermont: State v. Flint, 60 Vt. 304, 14 Atl. 178. Washington: *State v. Coats,* 22 Wash. 601, 61 Pac. 726. From the foregoing collaboration on the proposition involved it will be readily seen which side of the balance the great weight of judicial expression rests. We, therefore, declare the doctrine of this jurisdiction to be as annunciated by the Supreme Court of Tennessee above quoted, which may be epitomized by saying that such evidence is not admissible to support an impeached witness, except in those cases where not only his veracity is attacked, but his motive is also impugned. This being so, we will now consider the evidence to which objection is urged.

The learned Mr. Justice Clayton, speaking for the court in his decision in this case states: "We think the court erred in admitting the evidence of Rhea. But was this prejudicial error?" He then urges that it was not in the following language:

"The point in controversy was: Did the deceased at the time he was shot lay his hand on the post? And, if Kelley's testimony was contradicted, it was only on this point. We have already pointed out that the tearing down of the fence under the circumstances was not felony, and that act did not justify defendant in the shooting and killing Brady; and, therefore, if he were killed because of that, it was murder, and if he were not killed because of that, it was immaterial."

We clearly appreciate the force of the argument presented, but to our mind the error which was committed was not so much in reference to the substantive facts to which the evidence related, as it was to the effect which it had upon the testimony of both Kelley and the defendant. The portion of the opinion quoted, relating to the tearing down of the fence, and that this act did not justify defendant in shooting and killing Brady, calls for reference to the terms of the Annotated Statutes of 1899 of Indian Territory, relating to justifiable homicide. Paragraph 890 is as follows:

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony."

And paragraph 1008 of the Annotated Statutes of 1899 of Indian Territory which provides:

"If any person shall willfully or maliciously burn or otherwise destroy any rail or plank fence, or other enclosure, * * * shall be deemed guilty of a felony."

And it being made to appear by the evidence of defendant that, at the immediate time of the homicide or the shooting, Brady was in the act of pulling out or tearing down the fence, and that if his acts brought him within the purview of the statute last cited, this in itself appeared to be a justification for defendant's action. The decision holds, and we think correctly, that they did not constitute a felony, and hence was no defense to defendant, even though he were relying upon it. The deceased carried his revolver in a scabbard under his arm inside of his shirt, which was open in the front, and in addition thereto, had a slit in it. His revolver was found partially drawn from its receptacle, when he was examined, immediately after his death, as he lay upon the ground where he fell. It was the contention of Driggers that the deceased was engaged in drawing his revolver and throwing down the fence at the immediate time the shooting began, and that he did not shoot until he saw the revolver partially drawn and in the hand of Brady. Kelley was the government's principal witness. He had been an officer in that country holding commission from the United States marshal's office. Driggers testified that he and Kelley were enemies, and there was outside evidence tending to support him. Kelley and the defendant were the principal witnesses in this case as to what took place at the immediate instant of the shooting. They both claim to know, and they alone testify on that point although there was other evidence tending to sustain the government in its contention that, when Brady got off his horse, he was engaged in fixing his saddle and blanket and did not have hold of the fence at the time the shooting began. Driggers was entitled to no more than the law gave him. But he was on trial for his life, and was entitled to all that the law gave him. If, as we have seen, from the authorities cited, a witness contradicted or impeached by proof showing or tending to show that he has made statements out of court contrary to his evidence in court, may be supported under those conditions only where the party producing the impeaching evidence charges that the testimony of the witness is a recent fabrication, due to a late altered relationship to the parties or the cause or of some new motive, then if these conditions did not exist, Rhea should not have been permitted to have sustained Kelley, and in view of the fact that there is no evidence charging these things, or tending to show that his attitude toward the cause or the parties was in any wise altered, it was improper to admit this evidence; and while we agree with Justice Clayton that it was error, we cannot say it was not prejudical. If it was not lawful to sustain Kelley in this matter, Driggers was entitled to be relieved of the support given the adverse witness' evidence, and of the imputation which such support cast upon his own. If the jury believed that Kelley was telling the truth when he stated that Brady did not have hold of the post, they necessarily believed that the defendant was guilty of falsehood. If they believed that Kelley told the truth, and that Driggers falsified, in reference to the fact mentioned, which occurred contemporaneously with the shooting there can be no question that they would, at the same time and with good reason, come to the conclusion that Kelley also told the truth in reference to the shooting, and that here again Driggers was falsifying. It was this effect which the evidence in support of Kelley had, which to us appears to have constituted its chief prejudicial effect, rather than of the mere conflict in the evidence as to whether Brady did or did not take hold of the fence.

Was the evidence of Jim Saddler admissible? It will be observed that Saddler's evidence was taken before the United States Commissioner. He was not present at the trial of this cause, and his evidence as transcribed was admitted and read to the jury, over the objection of defendant, upon proof of the officer's return on the subpoena issued for him, showing that he was dead; and also it appears by the testimony of other witnesses that they had been told that he was dead. The question now presents itself, taking into consideration the duty of the court in the admission of evidence under circumstances of this character, was this proof of legal sufficiency as a foundation for secondary evidence? Paragraph 1995 of the statutes of Indian Territory provides:

> "A subpoena may be served by the sheriff, coroner or any constable of a county whose return thereof shall be proof of the service."

Encyclopedia of Pleading & Practice, under the title "Returns" (volume 18, p. 963), states:

> "An official return is the best evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify."

The question then arises, was the marshal in this case authorized and required to certify to the death of the witness, to secure whose attendance he endeavored to serve the subpoena? Was this the return authorized by the statute? This question is answered by the Supreme Court of the United States in the case of *Walden v. Craig,* 14 Pet. 147, 10 L. Ed. 393, wherein Mr. Justice McLean, who delivered the opinion of the court, says:

"It is admitted that the marshal's return of service, or non-service, which he indorses on the process, and of which he has official knowledge, becomes matter of record, and is binding on the parties. But the marshal can only know, in common with other citizens, of the decease of a person named in the writ; and if he indorse the fact of such decease, though it may be spread on the record, it is clearly not binding on the parties. Shall a rumor which shall, in the opinion of the marshal, justify such indorsement make the fact a matter of record? It may excuse the officer, but it does not bind the party whose rights are involved."

The officer in the case at bar may have known, in common with the other citizens, of the decease of the witness Saddler; but his return thereof on the subpoena not being authorized and required by law, was clearly not binding on the defendant. When he went beyond the statutory requirement and certified to a fact not made by law a part of his official duty, such certificate or such statement then contained no greater evidentiary or probative force than if made by any other person, one not an officer. *Obermier v. Core,* 25 Ark. 562. This being true, the question then arises, what force was the evidence of the other parties called and examined, who testified that they had been told that Saddler was dead?

We have examined a number of authorities on this proposition, and as usual, on close questions of this kind, there is contrariety of opinion among the courts. Alabama (*Burton v. State* 107 Ala. 68, 18 South. 240), Michigan (*Wheeler v. Jenison,* 120 Mich. 422, 79 N. W. 643) and Iowa (*Spaulding v. Railway Co.,* 98 Iowa, 205, 67 N. W. 227) hold that the matter is addressed to the sound discretion of the court, and that hearsay evidence is admissible to prove the absence of a witness from the jurisdiction, and sufficient to sustain the admissibility of secondary evidence. While this is true in the cases cited, in Alabama and Iowa the same courts have also held to the contrary on the same proposition. For instance, a later case in Alabama (*Mitchell v. State,* 114 Ala. 1, 22 South. 71) holds:

> "Where an officer, who had for execution the subpoena for an absent witness, and had returned it 'not found,' testifies that he had hunted for the witness, and she could not be found in the county, but he did not know that she had left the state, he cannot, for the purpose of laying a predicate for the introduction of evidence of the testimony of such absent witness given on the preliminary trial, further testify as to what was the report in the neighborhood where the witness lived as to her whereabouts, or that it was the general report in her neighborhood that she had gone out of the state; such evidence being merely hearsay and inadmissible."

In an earlier case in Iowa (*Baldwin v. Railway Co.,* 68 Iowa, 37, 25 N. W. 918) the court holds:

> "Under the provisions of section 3777 of the Code the shorthand reporter's notes of the testimony of a witness cannot be used on the trial of another cause, without first showing, as in the case of the use of a deposition, that the witness himself cannot be produced in court; and evidence that the witness was *reputed* to have left the state was not sufficient for the purpose."

The fact relied upon was the death of Saddler, and it was sought to prove it by showing hearsay statements that he was dead. No facts stated before the court established Saddler's death. All that anything in the evidence proved was that the parties who testified had been informed by others that this was a fact. This was unquestionably unallowed hearsay, and was inadmissible to prove the fact; and as a fact it must be proved to admit the evidence. Hearsay evidence is admissible in many instances, but where it is sought to introduce the evidence of a witness taken on a prior trial, based on the fact of his death, this death must be shown as a fact. And the court, in overruling the objection of defendant to the introduction of Saddler's testimony, committed error. All that these witnesses testified to could have been true, and Saddler may not only have been alive, but actually within the jurisdiction of the court. If he was he should have been produced in person. If he was not, this should have been proven as othei facts, by the testimony of some one who knew it.

The defendant took formal exception to but one instruction given by the court. This was the instruction relating to the law of mutual combat, but he offered to the court, and requested that they be given to the jury as the law of the case, six instructions which, with the exception of No. 2, related generally to rights which he claimed, growing out of his possession of the field over which the controversy arose. All of these were refused, and defendant urges error therefor. Instruction No. 2, which he offered, relates to the instruction in reference to Tom McCarter, who was one of the defendants jointly indicted with Driggers. Justice Clayton, speaking for the Court of Appeals in the decision heretofore rendered in this case, so accurately states the law applicable that we adopt that portion of the opinion as ours, and agree with that court that there was no error in refusing this instruction in view of the one given. His language is as follows:

"The eighth assignment of error complains of the charge of the court relating to the necessity for corroborating testimony of an accomplice before conviction can be had. The defendant requested the following instruction. 'You are instructed that Tom McCarter, the witness introduced by the government, is an accomplice in the offense charged against the defendant, and a conviction cannot be had upon his testimony, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that an offense was committed, and the circumstances thereof.' The charge of the court was as follows: 'Under the laws of Arkansas (section 1602, Ind. T. Ann. St. 1899) it is provided as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof."' An exception was saved to the refusal of the court to give the requested instruction, but none saved as to the charge given. The only difference between them is that in the requested instruction the court is asked to charge the jury that Tom McCarter was an accomplice, while the instruction given left that question to the jury. Whether McCarter was an accomplice or not was a question of fact, to be determined by the jury. 'The court is not required to affirmatively charge that a witness is an accomplice. Where he is admitted to be such, or the facts place this beyond dispute, the court may so charge, without invading the rule that charges should not be upon the weight of the evidence. Whether or not a witness is an accomplice is a question of fact, and the charge may be so framed as to submit this as an issue to the jury. It was not necessary, in this case, to instruct the jury that Anderson was an accomplice.' (*Dill v. State* [Tex. Cr. App.] 28 S. W. 950.) 'It is urged that it was plain from the testimony of the witness Kelley that he was an accomplice of the dedefendant, if defendant committed the crime alleged, and the court should have so instructed the jury; but the court fully and carefully instructed as to the weight and effect of the testimony of an accomplice, and to have gone further and told them that Kelley was an accomplice would, have been clearly a charge with respect to matters of fact, which is not allowed.' (*People v. Sansome,* 98 Cal. 235, 33 Pac. 204) See, also, *Spears v. State,* 24 Tex. App. 537, 7 S. W. 245. If the plaintiff in error regarded the word 'accomplice' as a technical, legal one, requiring, at the hands of the court, a definition, he should have requested it, and not by asking a declaration on the part of the court that McCarter was an accomplice, for this would be a finding of fact from the proof. And this was the effect of the requested instruction. 'While in one sense it is undoubtedly the duty of the judge to give instructions to the jury covering the entire law of the case, as respects all the facts proved, or claimed by the respective counsel to be proved, still, if he omits something, and is not asked to supply the defect, the party who remained voluntarily silent cannot complain.' (1 Bishop, Cr. Proc. § 98; *Carroll v. State,* 45 Ark. 548.) The court followed the language of the statute, and in this case it was amply sufficient, and there was no error in refusing the requested instruction."

In reference to the right which Driggers had, claiming, as he did, the possession and the right of possession of the field under contest, he requested the court to give the following instruction:

"If the jury find from the evidence that the defendant Driggers had rented the stock field, referred to in the testimony, from Goff and Riley, and was in possession of the same, then the deceased would not have the lawful right to eject the defendant therefrom by force of arms. And if you further find from the evidence that the deceased attempted to take the possession of said stock field from the defendant Driggers with force of arms under such circumstances as reasonably indicated to defendant that it was the purpose of the deceased to use deadly weapons in obtaining possession of said stock field, then defendant Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested an intention to kill defendant Driggers or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find, you will acquit the defendant. If the jury believes from the evidence that defendant Driggers was in his own field and on his own premises, and that he was advised that the deceased had threatened to take possession of his property by force, and in good faith believed, as a reasonable man, that the deceased intended to kill him or do him great bodily injury in order to get possession of the field, and whilst so in his own field deceased came there and undertook to enter the field by tearing down the fence, and in a violent threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and acting under the influence of said belief. whilst deceased was so endeavoring to enter the field, defendant killed him (deceased), the killing would be justifiable."

We believe from a reading and careful consideration of these instructions that they correctly state the law in reference to the right Driggers had in the premises and his right of defense in resisting the efforts of Brady to secure or take possession of the land. These being correct, the question now arises, did the court give these instructions to the jury, or did the charge which he gave contain substantially the same matter? The court's instructions on this subject are as follows:

"You are instructed that a man may use force to defend his real or personal property, in his actual possession, against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. You are instructed that, although you may believe from the evidence that the deceased had rented the lands in controversy, and was entitled to the possession thereof, still he was not justified in driving his cattle thereon, or taking possession of the land by force, if the same was in the actual possession of the defendant. But the court would instruct you that an attempt of the deceased to drive his cattle on the premises would not of itself be a felony.' If you believe from the evidence beyond a reasonable doubt that the defendant, either by himself, or acting with others, armed himself, and had others with him who were armed, for the purpose of going to the stock field in question and preventing the deceased from driving the cattle into said stock field, and that his purpose in being so armed was to prevent an entry into said stock field on the part of the deceased with said cattle, and if you further believe that it was his purpose and intention in being thus armed and present at said place to make an assault upon and kill the deceased, or otherwise attempt to injure him with a deadly weapon, if the deceased attempted to drive said cattle into said stock field, and in pursuance of said purpose he did shoot at and others acting with him did shoot and kill the deceased, then in such case such act upon the part of the defendant, if the deceased was thereby killed, is murder, although you may believe that the deceased was fired upon and his death ensued thereafter by reason of the fact that he may have attempted to pull down the fence for the purpose of entering said cattle."

It will be observed that the instructions given by the court were probably predicated upon the testimony which Kelley gave concerning the threat made by Goff on the day previous, to the effect that if Brady put the cattle into the field, he would kill him; either this, or upon the facts which developed between the time this threat was made and the affray. If upon the former, then it was correct, as the evidence we have found was incompetent; and if upon the latter, it seems to us that it scarcely takes into consideration, to the extent to which defendant was entitled, his evidence given as to why he went to the field, and the contention made in reference to his claim of right there. His claim being, as stated by his counsel in his brief, that "he was on his own premises, trying to protect his own property against the wrongful trespass of the deceased, and while so protesting, and while making no effort to kill the deceased, the deceased assaulted him with a deadly weapon," and that the homicide took place, not by reason of the attempted trespass on the property, destruction of the fence, nor the turning in of the cattle on it by deceased, but because of the alleged attempt of deceased to draw his revolver and inflict death or great bodily harm upon the defendant. The instructions given by the court present the theory of the prosecution, and state the law in relation thereto without error; but the defendant was entitled to have the law declared in reference to the facts which he contended the evidence reasonably tended to show, and if there was any evidence in the record upon which the instructions offered could properly be predicated, they should have been given.

The instructions asked and refused stated that:

"Driggers had the legal right to meet force with force, and if the deceased by any act then done manifested any intention to kill the defendant Driggers, or to inflict serious bodily injury upon him, then the defendant had the legal right to kill the deceased; and if you so find you will acquit the defendant."

And, further, that if, while defendant was peacefully in his own field, "the deceased came there and undertook to enter the field by tearing down the fence, and in a violent threatening manner reached for his pistol, and with said pistol partly drawn in a threatening manner undertook to enter the field where defendant was, and that defendant believed, as a reasonable man, that deceased intended to kill him or do him great bodily injury, and, acting under the influence of said belief, whilst deceased was so endeavoring to enter the field, defendant killed him (deceased), the killing would be justifiable." We believe this instruction, taken in conjunction with the elaborate and correct statement of the law of self-defense, correctly stated the rule, which defendant was entitled to have declared.

As above stated, exception was reserved to but one instruction, given by the court, which was one on mutual combat, and is as follows:

"If you should believe from the evidence that the defendant B. F. Driggers was informed and believed that the deceased and one Tom Kelley had taken possession of a certain stock field the day previous to the killing, which stock field was also claimed by the defendant, and the defendant was informed and believed that the said Kelley and the deceased, or either of them, would be at the field in question on the morning of the killing, and that the man Kelley or the deceased had made threats against the life of this defendant, and that the defendant believed that Kelley and the deceased and others would be at the field in question, having in their possession deadly weapons, as mentioned heretofore, and you further believe that the defendant, knowing all these things, voluntarily organized or assisted in organizing a company of men, arming himself and such men with deadly weapons, guns, and revolvers loaded, and that such preparation was for the purpose of meeting the said Kelley and the said deceased in deadly conflict, and that the defendant proceeded to the place of the killing with said company and with said arms, and that at such time and place a conflict ensued with deadly weapons, and the deceased was killed, and the defendant participated in the shooting, then such conflict would be what is known in law as a 'mutual combat.' And if in such combat a party is killed, all parties, who knowingly and intentionally engaged in the conflict, are guilty of murder."

After the jury had retired and had been out about 20 hours, it returned back into the court, and presented to the court, the following question: "Your honor, does the charge of what is known as 'mutual combat' cut out the right of self-defense?" The court, in answer to this inquiry, added to the instruction above quoted, after the words "guilty of murder," the following language, "and cannot claim the right of self-defense if you can so find."

This instruction was predicated upon the contention of the prosecution in this case. The expression "mutual combat" about as clearly conveys the meaning of what is required to constitute it as any definition could. It means, in different language, though probably not more clear, an agreement or meeting of minds between two parties to fight, whether with or without arms. It means a coming together, with a mutually understood purpose for a violent contest. The government took the position that the evidence in this case established that Driggers and his party knew that Brady and his party were coming to the field armed, for the purpose of driving cattle in on this field and taking possession thereof at all hazards. That they knew, or had reasonable ground to believe, that Driggers and his party would be armed, with the purpose and intention, as declared to Brady by Goff on the day before, of killing him if they carried out this purpose. That Driggers and Goff gathered together men, arms, and ammunition for the purpose of using them in preventing these things on the part of Brady, thereby, through these acts, creating the agreement to fight, and in view of this claim which, it must be conceded may be said to find reasonable support in the evidence, in our judgment the instruction given was not erroneous.

Counsel for defendant in their briefs inveigh against it most vigorously, denominating it "a fiery and fierce resume of the most strained construction of the evidence against the plaintiff in error, with many exaggerations to his detriment, which suggests many conclusions and deductions of which the evidence is wholly incapable." While it is true the instruction improperly includes a revolver with the other weapons which defendant's party had, yet it will be noted that this instruction in fact assumes nothing as proved or as true, but places upon the prosecution the very highest possible burden of proof in the case. It does not assume, as is asserted, that Brady had possession of the field, but requires the jury to find from the evidence that Driggers was informed and believed that Brady had taken possession of the field, and requires proof that defendant was informed and believed that Kelley and the deceased would be at the field in question on the morning of the killing, having in their possession deadly weapons, and further requiring the jury to find and believe that defendant, ***knowing*** of these things, voluntarily organized a company of men, and armed them *"for the purpose* of meeting said Kelley and the said deceased in deadly conflict." If this fact was not proved by the evidence, then the law of mutual combat did not apply, and the instruction fell with it. But to find this the jury were compelled to find against all of the evidence by defendant on this point, and to find that the extreme contention of the prosecution was true. We do not see that the defendant could complain of this.

This instruction placed a heavy burden upon the prosecution, and to our mind in fact, instead of being adverse to the defendant, was really favorable to him. Of course, in passing on this instruction we do not presume to say that the evidence in this case established mutual combat. All that we hold is that there was evidence in the case sufficient, under the claims of the prosecution upon which to predicate this instruction, and under it the government was entitled to have the law relating thereto declared. It is strenuously urged that it should have contained a saving clause, providing for the contingency of defendant's withdrawal from the coming fray. There is no question on the law on the subject, for the defendant, even though he went to the field for the purpose of engaging in a mutual combat, if he, in good faith, withdrew, and sought to avoid the difficulty before the fatal moment, and if, while in this attitude, the deceased himself brought about, by his acts, a condition wherein the life of the defendant was endangered, or where he in good faith believed it was, then the right of self-defense would exist in him, and he would have the right to defend his life as against the deceased, notwithstanding his previous intentions to engage in a combat. But did he withdraw? Counsel urge and insist that, when defendant sent word to Brady not to come there, he could not turn the cattle in; that this amounted to a withdrawal. We cannot consent to this. It seems to us that it was an effort, or an invitation at least, to induce Brady and his party to withdraw, not a withdrawal of Driggers. He remained where he was, with his gun and his party, and awaited the arrivel of the deceased, who, with his party, came on, and the conflict ensued.

We believe we have now covered practically all of the propositions urged in this court which will be likely to again arise in a new trial hereof, and we believe that a trial, conducted along the lines and within the limitation herein prescribed, will safeguard the rights of both the state and the defendant. The decision is accordingly reversed, and the case remanded to the district court of Garvin county, with instructions to grant the defendant a new trial.

Hayes, Kane, and Turner, JJ., concur; Williams, C. J., disqualified.

RUTHERFORD V. UNITED STATES.

No. 843. Ind. T. Opinion Filed May 16, 1908.

(95 Pac. 753.)

TRIAL—Instructions—Circumstantial Evidence. Where, in a criminal case, circumstantial evidence solely is relied on for a conviction, it is error for the trial court to fail and refuse to instruct on the law applicable thereto when the defendant requests it.

(Syllabus by the Court.)

Error from the United States Court for the Central District of the Indian Territory, at Atoka; Thomas C. Humphrey, Judge.

Emmett Rutherford was convicted of grand larceny, and appeals. Reversed.

On the 14th day of November, 1905, the grand jury for the United States Court in Indian Territory, Central District, sitting at Durant, returned its indictment into open court charging Emmett Rutherford and Charles Jones with having on the 12th day of June, 1905, within that jurisdiction, committed the crime of grand larceny of certain saddles and harness belonging to E. R. Benson of the value of $62. Jones fled and was not caught. The defendant, Rutherford, on arraignment, pleaded not guilty.

The evidence connecting Rutherford with the offense was entirely circumstantial. The facts are briefly as follows: Benson, the prosecuting witness, lived on a farm near the little town of Utica. On the night of the 12th of June, 1905, there was taken from his barn and harness house the goods mentioned in the indictment. He went to town the next morning, secured the services of one Dobbs, who, on going to the place where Rutherford lived and where two Jones brothers were stopping, found a borrowed buggy in the yard in which was a whip, part of the goods which had been stolen from Benson. On going into the house and calling for the defendant, who lived there, he, being upstairs, came down, and observing Dobbs, ran back again. Dobbs, having no warrant for his arrest, went to town to procure it, and coming back, found that the Jones boys, who had been there when he first went to the place were gone, and after a search the defendant was found concealed or partially concealed about half a mile from his home. Tracks of two of the parties led toward the place where the stolen property was afterwards found. The searching party was led to the place of its concealment, which was about 3½ miles from defendant's home, by the defendant, and while he did not take the stand, it developed from cross-examination of members of the searching party that they were informed by him that the Jones boys had told where the property was located, and in this manner he was able to disclose it.

The case was tried to a jury, which returned a verdict finding the defendant guilty as charged, and the court sentenced him to serve two years in the United States penitentiary. Motion for new trial was filed and overruled, and the case was taken by writ of error to the United States Court of Appeals for the Indian Territory at South McAlester, and was pending there on the passing of that court with the organization of the state of Oklahoma, and is before us by virtue of the terms of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267).

Hatchett & Ferguson, for appellant.

Fielding Lewis and *W. C. Reeves, Assistants Attorney General,* for the State.

DUNN, J (after stating the facts as above). Defendant requested the court to give the following instruction:

"The jury are instructed that if in this case they can reconcile the circumstances tending to show defendant's guilt, if any, reasonably with the fact of the innocence of defendant, then it is your duty to acquit him."

In addition to this, on the refusal of this instruction, counsel for the defendant again urged the court to charge the law on circumstantial evidence. The instruction which was presented and the specific request were both refused by the court and error which is confessed by the Attorney General, is assigned therefor. The instruction asked for, or one governing the proposition involved, should have been given, and it was error for the court to refuse it. The Annotated Statutes of Indian Territory for 1899, § 1600, provides: "When the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case"—and the authorities all hold, and without dissent, that where circumstantial evidence is relied upon for conviction this necessitates the court on the trial, when requested, to give the law applicable thereto in its instructions to the jury, and a failure to do so is error. 12 Cyc. 633; *State v. Cohen,* 108 Iowa, 208, 78 N. W. 857, 75 Am. St. Rep. 213; *Hamilton v. State,* 96 Ga. 301, 22 S. E. 528; *Wantland v. State,* 145 Ind. 38, 43 N. E. 931; *Gablick v. People,* 40 Mich. 292; *Territory v. Lermo,* 8 N. M. 566, 46 Pac. 16; 1 Greenleaf on Evidence, § 34; *People v. Scott,* 10 Utah, 217, 37 Pac. 335.

The rule as annunciated in Cyc. *supra,* is as follows:

"Where the prosecution relies solely upon circumstantial evidence, the court must always instruct upon the nature of circumstantial evidence. Such evidence should be expressly defined, and the rules governing its effect concisely stated."

In discussing the law of presumptive evidence Mr. Greenleaf, in the section cited above, thus states the reasons of the propriety and righteousness of such instruction:

"Thus, as men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal persumption of innocence is to be regarded by the jury in every case as matter of evidence, to the benefit of which the party is entitled. And where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion."

In commenting on the refusal of an instruction requested by a defendant on circumstantial evidence in a Michigan case, *Gablick v. People, supra,* Mr. Justice Cooley, who was at that time a member of the court, says:

> "We think the plaintiff in error was entitled to the instruction requested. It is perfectly true that the jury must judge of the proper weight of the evidence; but when evidence is laid before them which only indirectly tends to raise an inference of guilt, and the importance of which must depend altogether upon circumstances, it is the right of the respondent to have the jury instructed how these circumstances bear upon the presumption of guilt. Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see *People v. Walker,* 38 Mich. 156); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered. A jury may or may not attach importance to these circumstances; but as the law permits the inference of guilt to be drawn, under some circumstances, and not under others, the jury should have some instruction how to deal with these circumstances when they are placed before them."

The compiled laws of Utah relating to instructions to juries are, in effect, substantially the same as those of Indian Territory. and in the case of *People v. Scott, supra,* it appears that the evidence on which it was sought to convict the defendant was circumstantial, and that defendant offered an instruction on this point, which was denied by the court, and the Supreme Court in that case held that, "where the testimony in a criminal case is entirely circumstantial, it is the duty of the court to charge upon the law of the subject, though the request offered by defendant on this subject was erroneous"; this being based upon the proposition that, although the instruction may not have been strictly formal, it at least amounted to a request or a motion, the denial of which was error.

The danger in cases where circumstantial evidence is entirely relied upon for conviction is that jurors being brought into court and impaneled for the purpose of determining the guilt or innocence of the defendant, and the court admitting the circumstances as evidence against the defendant, unless warned in some manner might be inclined to believe that absolute proof of the circumstances would be conclusive proof of the crime, and their attention would be exclusively directed to the evidence which established the incriminating circumstances, instead of weighing and judging whether or not the incriminating circumstances proven established the ultimate fact and proved beyond a reasonable doubt that defendant was the guilty party.

There are other assignments of error urged, practically all of which relate to alleged erroneous instructions, and, as the same questions will probably not arise in a further trial hereof, there will be no value in the discussion thereof.

The judgment of the trial court is accordingly reversed and set aside, and the defendant granted a new trial.

All the Justices concur.

GIBBONS V. TERRITORY.

Nos. 2076 and 2103, Okla. T. Opinion Filed June 22, 1908.

(96 Pac. 466.)

TRIAL—Instructions—Reasonable Doubt. The trial court erred in instructing the jury that: "By the term 'reasonable doubt,' as used in these instructions, is meant a doubt that has a reason for it. It is a doubt that you can give a reason for"—and the same is cause for reversal of the judgment.

(Syllabus by the Court.)

Error from District Court, Caddo County; Frank E. Gillette, Judge.

Thomas Gibbons was convicted of murder, and brings error. Reversed.

At the November term, 1905, of the district court for the Seventh judicial district of the territory of Oklahoma, at Anadarko, Thomas Gibbons, plaintiff in error, defendant below, together with one M. C. Reddington, were jointly indicted for the murder of one T. C. Renfro, by shooting, alleged to have been committed in the county of Caddo on July 13th of that year. On November 27, 1905, defendant was arranged, pleaded not guilty, asked for and was granted a severance, was tried by a jury, found guilty, and was sentenced to imprisonment for life, from which judgment and sentence he appealed to the Supreme Court of the territory of Oklahoma, and the case is now before us, as successor of that court, for review.

P. H. Cullen, for plaintiff in error.

W. O. Cromwell, Atty. Gen., for the Territory.

TURNER, J. (after stating the facts as above). The evidence discloses that defendant was director of school district No. 115 in said county, and had been some time prior to the homicide, and that M. C. Reddington, jointly indicted with him, had been elected clerk and had resigned. On August 16, 1904, J. E. Beard, as treasurer of said district, called a meeting of the voters thereof for the purpose of electing a clerk to succeed Reddington. On August 26, 1904, at the meeting for that purpose, the deceased, Renfro, was elected clerk, and Reddington filed his resignation as such, and on November 16, 1904, turned the books over to him. On May 31, 1905, pursuant to a notice given by deceased, Renfro, as district clerk, for an election of officers for that district, defendant was elected for three years, M. C. Reddington clerk for an unexpired term of two years, and M. O. Nation treasurer for an unexpired term of one year. On the same day, Reddington duly qualified as such, and on June 13, 1905, together with Gibbons as director and Nation as treasurer, duly filed their acceptance of office with the superintendent of public instruction of Caddo county, as required by law. A short time thereafter, a report was filed with the county superintendent of Caddo County by deceased, Renfro, as clerk, in which he certified that at the school election held May 31, 1905, in school district No. 115, the following persons were elected to the respective offices therein set forth, viz: Thomas Gibbons, director; T. C. Renfro, clerk; and J. E. Beard, treasurer. That shortly thereafter Reddington, as clerk of said district, made a demand on the deceased, Renfro, for the books and records pertaining to said office, which he refused to surrender.

After securing the advice of the county attorney, defendant and Nation, as directors of school district No. 115, brought suit in replevin before one Dillingham, a justice of the peace, to recover said books; but the same was for some reason dismissed by the justice. On July 10, 1905, defendant, as dircetor of said district, caused another suit in replevin to be brought, entitled "School District No. 115 v. Thurston Renfro," before T. C. Britton, a justice of the peace, to recover from deceased the books and records aforesaid, and owing to the fact that there was no constable in that township, and failing to obtain the services of H. W. Boulware, a deputy sheriff, the justice of the peace on his own motion appointed Plowman as special constable to serve the process. He was a stranger to Renfro and slightly acquainted with the defendant, resided in another school district, was a man of delicate health, and of very defective eyesight. On the evening of the day the process was issued, Plowman went to Renfro's house to serve the papers, taking Nation along to identify the books and papers mentioned in the writ; but Renfro was not at home, and the process was not served at that time.

On the morning of the 12th, as Nation could not go on account of sickness, Gibbons accompanied Plowman in the service of the process in order to identify the property sought to be replevined. On exhibiting the process to Renfro, he declared the same to be improper, and refused to give up the property, and wheeled and went into the house, saying that he regarded any man trying to take possession of it as hunting trouble, and that "he would be damned sure to get it," at which Plowman and defendant rode off. That same day Plowman returned to the justice of the peace and sued out a writ charging Renfro with resisting him as an officer in the service of process and refusing to deliver the property sought to be replevined which was placed in his hands for service, returnable forthwith before said justice. Gibbons was present at that time, but did not advise the suing out of the writ, and was, without his seeking, appointed as a special deputy on Plowman's suggestion to assist him in the service of the process. The next morning, Plowman, accompanied by Gibbons, armed with the process aforesaid, went to the home of the deceased, Renfro, to serve the same. As they rode up, they found him and one J. B. Berry, a neighbor, seated under a tree near the house. After exchanging friendly salutations, Plowman produced the writ of replevin, which was read to the deceased, There is considerable conflict in the evidence from this time on as to what actually occurred. Berry, the only eyewitness other than defendant, swore that Renfro agreed to give up the books. Gibbons swore that he declined to do so. Plowman dismounted, and together with Renfro, approached the east door of the house coming from the north; Berry following at a short distance. Defendant remained seated on his horse. When within about eight feet of the door, something was said about a warrant, and Renfro, replied: "I will go with you." About that time defendant dismounted and hitched his horse and slowly approached Plowman and Renfro. Renfro, seeing him coming, ordered him to keep out of the yard. Plowman said: "Tom Gibbons, I deputize you to search the house." Renfro replied: "You cannot search the house without a search warrant." Renfro's manner was determined, and Plowman seemed very nervous. Renfro opened the east door and sprang into the house. There was a loaded rifle and a shotgun leaning against the west wall near the door and a 38 revolver, loaded, lying close by the table. Defendant and Plowman were standing at the end of a plank leading to the east door about eight feet away. Here the testimony conflicts. Berry said that when Renfro entered the east door he was standing near the northeast corner of the house, when Plowman and defendant rushed abreast across his line of vision into the house, at which time the shooting commenced in the house. Defendant said that they did not enter the house, but that the firing was done by

Renfro from the inside, shooting at them through the open east doorway. Both agree that Plowman jumped back and ran around the southeast corner of the house, which consisted of one room 14x16, with a door in the east and west sides and a window in the north and south ends; that Renfro, rifle in hand, went out the west door and rushed around the southwest corner of the house, where he met Plowman. There was a shot fired by Renfro, and Plowman fell dead, shot in the back, his pistol the only weapon he had, being found lying on the inside of his coat on the left side, which had been thrown back, indicating that it had been snapped once, but not fired. Here the testimony again conflicts. Berry says he was standing close to the northeast corner of the house, but could see diagonally through the door and through the window on the south side; that he thus saw Renfro south of the house, and heard the shot, but did not see him fire. He said: That when Plowman and Gibbons first rushed in the house, and the firing took place, they both jumped back, and Plowman ran around the southeast corner, where he was shot; that Gibbons, after Plowman was shot, rushed back into the house, where he saw him and Renfro struggling; that he heard more shooting in the house, and started to leave the scene, when the shooting ceased, and Gibbons emerged from the house and hailed him after it was all over. Gibbons says: That, when Plowman rushed around the house in one dircetion, he went around the house in the other direction; that he started for the west gate, and saw Renfro coming back from the shooting of Plowman around the southwest corner of the house, when he (Gibbons) jumped back and sought shelter behind the north end of the house; that before he reached it Renfro fired at him, but missed and was upon him; that he had his pistol in his hand, and Renfro his rifle that they grappled, and a struggle ensued for the rifle to keep Renfro from shooting him. In the struggle, while they were near the west door, he shot Renfro twice in the breast. Renfro's body was found in the house lying with his feet near the west door and his head a little north of east, near his bed with his rifle lying across his body the butt being upon the floor the muzzle resting against the bed, with a deep cut as though made with a blunt instrument across his forehead.

The theory of the prosecution was that a conspiracy existed between Reddington and Gibbons to kill or "fix" Renfro, that ill feeling had existed between them some time, and that the process sought to be served on Renfro was a subterfuge under cover of which Gibbons went to deceased's house and killed him. The defense contended that the process was sued out and was sought to be served in good faith, that in its service deceased assaulted and killed Plowman without provocation, and that defendant killed Renfro in his own necessary self-defense while he was resisting lawful process.

Numerous errors were assigned by defendant, but the only one necessary for us to consider is that the court erred in charging the jury, over the objection and exception of defendant, as follows:

> "By the term 'reasonable doubt,' as used in these instructions, is meant a doubt that has a reason for it. It is a doubt that you can give a reason for. It is that state of the case which, after a full consideration of all the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubt or entertain doubt from mere caprice or conjecture. Such doubt should arise from a candid and impartial consideration of all the evidence and facts and circumstances presented upon the trial. If, upon sonsideration of all the evidence, doubt does so arise, and by reason of it you cannot say that you are satisfied to a moral certainty of the guilt of the defendant, you should return your verdict herein not guilty."

This instruction, in almost identical language, was disapproved in *Abbott v. Territory*, 20 Okla. 119, 94 Pac. 179, and that it does not state the law can no longer be considered an open question in this jurisdiction. This court, in that case, speaking through its learned Chief Justice, said:

> "This same question has been before the Supreme Court of Iowa. An instruction in almost the identical language was disapproved in the case of *State v. Cohen*, 108 Iowa, 208, 78 N. W.

857, 75, Am. St. Rep. 213, where it was held that: 'An instruction defining a "reasonable doubt" as one that the jury are able to give a reason for is erroneous, as, in effect, placing the burden on defendant to furnish reasons for acquittal.' And where it was further held that: 'An instruction defining a "reasonable doubt" as one that the jury are able to give a reason for is erroneous, as requiring jurors to give reasons for their conclusions.' And in this case the court, speaking by Mr. Justice Ladd, used the following language: 'Nor can we approve the fifth instruction as a safe definition of "reasonable doubt." By a "reasonable doubt," as herein instructed is meant a doubt such as reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for. The last clause is one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of finding reasons for not finding guilt established is thus cast on the defendant; whereas, it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.' In *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, the Supreme Court of Indiana held that: 'It is erroneous to instruct the jury that a "reasonable doubt is such a doubt as the jury are able to give a reason for." ' In *State v. Sauer*, 38 Minn. 439, 38 N. W. 355, Mr. Justice Mitchell, who delivered the opinion of the court says: 'The most serious objection to it is that it is liable to be understood as meaning a doubt for which a person could express a reason in words. A person may, after a consideration and comparision of all the evidence, feel a reasonable doubt as to the guilt of a defendant, and yet find it difficult to state the reason for the doubt.' In *Owen v. United States*, 130 Fed. 279, 64 C. C. A. 525, an instruction in the following language: 'A reasonable ground of doubt is one which is reasonable from the evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence'—was disapproved."

We are therefore of the opinion that the court erred in giving the instruction complained of, and for that reason the case should be reversed. It is not necessary to discuss the questions raised in the record on defendant's application for a new trial on account of newly discovered evidence.

The judgment of the trial court is reversed, and this cause remanded, with instructions to grant the defendant a new trial.

All the Justices concur.

BRUNER v. UNITED STATES.

No. 792, Ind. T. Opinion Filed June 23, 1908.

(96 Pac. 597.)

1. **EVIDENCE—Overtures to Witnesses.** To admit in evidence overtures to purchase witnesses to testify in defendant's behalf, where it is not shown that defendant was responsible therefor, is error.

2. **SAME—Evidence of Independent Assault—Purpose—Instructions.** Where, in a homicide case, evidence is admitted of an independent assault hade by a third party unknown to defendant upon deceased, by reason of which deceased was being taken home and killed on his way by defendant, the purpose and effect of such evidence should be set out by the court in an instruction limiting it in its operation to an explanation of the presence of the deceased at the place of the homicide.

(Syllabus by the Court.)

Error from the United States Court for the Western District of the Indian Territory, at Okmulgee; Louis Sulzbacher Trial Judge.

Louis Bruner was convicted of manslaughter, and he brings error. Reversed.

Joe S. Eaton and *H. E. P. Stanford,* for plaintiff in error.

William M. Mellette, U. S. Atty.

DUNN, J. Lewis Bruner was convicted at the February, 1906, term of the United States Court for the Western District of the Indian Territory at Okmulgee of the crime of manslaughter, from which judgment and sentence thereon he appealed to the

United States Court of Appeals of Indian Territory, and the case is before this court by virtue of the terms of the enabling act.

At the close of the case, on the part of the government in rebuttal. one Jessie McGee was offered as a witness against the defendant. Objection was made to the reception of the testimony of this witness, for the reason that her name did not appear upon the indictment, and, although the rule had been invoked for the exclusion of the witness, she had been in the courtroom during the taking of the testimony. This objection was overruled, and the witness was restricted in her evidence to such only as was not covered by the testimony of any witness who had theretofore testified in the case. She testified that John Bruner, the defendant's brother, had offered to pay her $25 if she would testify in defendant's behalf. There was no showing made as to what she was expected to testify to, but merely that it was to be in the interest of the defendant. In a conference which took place between the counsel and the court on the admission of this evidence, counsel for the government represented that the defendant would be connected with the offer. On its conclusion, counsel for the defendant moved to strike it out, for the reason that it was not shown that the defendant was connected with the making of the offer, and that it was on this condition that evidence was admitted. The court overruled the motion to strike out the evidence, and this is assigned as one of the errors. There is no pretense that the evidence was offered for the purpose of impeaching John Bruner who was a witness for the defendant, and no authority is cited by counsel for the government tending to support or sustain its admissibility. That it was incompetent and irrelevant we think there can be no question, nor can we say that it was not prejudicial to the rights of the defendant. If the defendant could have been shown to have been connected with it, to have either made the offer himself or to have prompted his brother to make it, or even had it been shown that he was making a promiscuous offer for witnesses to testify in his behalf, the evidence would have been admissible against him because of these things, but the authorities are practically without exception that such evidence is inadmissible and that its reception by the court was error. *Cecil v. Territory,* 16 Okla. 197, 82 Pac. 654; *Hardtke v. State,* 67 Wis. 552, 30 N. W. 723; *Newton v. State,* 41 Tex. Cr R. 610, 56 S. W. 64; *Nalley v. State,* 28 Tex. App. 387, 13 S. W. 670; *Rushing v State,* 25 Tex. App. 607, 8 S. W. 807; *Barbee v. State,* 23 Tex. App. 199, 4 S. W. 584; *Favors v. State,* 20 Tex. App. 155.

The case of *Cecil v. Territory, supra,* was one wherein the defendant was charged with the crime of rape. During the trial of the case the father of the defendant was called as a witness for the territory, and over the objection of the defendant. was required to detail the particulars of certain negotiations which he had conducted with the parents of the girl, having for their object a settlement or compromise of the criminal proceedings about to be brought against his son. It was not shown that the son knew of these negotiations. Justice Gillette, speaking for the court, said:

"'The admission of the defendant, particularly an offer on his part to pay a certain sum of money to the prosecutrix or her mother, to settle the matter, are always relevant against him.' Underhill on Criminal Evidence, § 418; *Hardtke v. State,* 67 Wis. 552, 30 N. W. 723; *McMath v. State,* 55 Ga. 303. As the evidence fails to in any way connect the defendant with the negotiations of the father, it was clearly hearsay, incompetent, and prejudicial, and its reception was material error."

In the case of *Hardtke v. State, supra,* the prosecutrix was allowed to testify over the objection of the defendant's counsel that a certain party had told her what to say in reference to her injury. This was assumed to have been at the instance of the defendant when there was no evidence to support it, and the court in the syllabus holds: "The prosecutrix should not be permitted to testify what a third person, not shown to have been acting for the defendant or with his knowledge, told her to say about the injury." And this is one of the grounds on which the case was reversed.

The case of *Newton v. State, supra,* was one similar to the case at bar, wherein an offer was made to a witness by a third party to testify in defendant's behalf. It was shown that the defendant was not present when this offer was made, and that he knew nothing about it. The court in the consideration of the same says: "It is well settled, by a long line of decisions in this state, that overtures to purchase witnesses, and matters of that sort, made by others than defendant, without his knowledge and consent, cannot be used against him upon his trial." And the case was reversed on account of this error.

Nor, as we have above said, are we able to say that this evidence was not prejudicial to the defendant. He was entitled to have the issue of his guilt or innocence presented to the jury upon the relevant and competent evidence properly applicable thereto, and he was entitled to be relieved of the damaging cloud which evidence of this character would throw over his entire case unless he was responsible for it. The illimitable scope of undeserved damage the cause of a defendant might suffer through friends or enemies should evidence of this character be admissible is readily seen; and where in a case such evidence appears, and it is not clearly shown that the defendant is responsible for it, and proper exceptions are saved, a conviction will not be sustained. It is a general rule, finding sanction in many authorities, that, "where testimony is erroneously received which may have influenced the court or jury in the findings or verdict, the error cannot be considered immaterial." Such is the holding of the Supreme Court of the state of Kansas in the case of *Gillcland v. Schuyler,* 9 Kan. 569, which is cited approvingly by that court in the case of *State v. Nolan,* 48 Kan. 723, 29 Pac. 568, 30 Pac. 486, wherein Mr. Chief Justice Horton, speaking for the Supreme Court of that state, and quoting from the case just cited, which was written by Mr. Justice Brewer, says:

"It may be said that the testimony was immaterial, and that the error worked no substantial injury to the plaintiffs in error, because, first, there was sufficient testimony without this to support the findings. * * * If testimony is erroneously received which may have influenced the court or jury in the finding or verdict, we cannot call the error immaterial. The findings or verdict must be based upon nothing but competent testimony before any presumption in favor of their correctness will arise in this court; for otherwise the court or jury may, disbelieving the witnesses who give competent testimony, reach their determination mainly or wholly on the incompetent evidence, and so a party obtain a judgment he is not in fact entitled to. The record must be clean, which, when passed upon by court or jury is sought to be sustained in this court because it has been so passed upon."

For the error caused by the introduction of this testimony, this cause must be reversed.

We will, however, notice one other objection made on the introduction of the evidence which would be likely to occur in the new hearing. There is but little controversy between the evidence for the state and that tor the defendant. The homicide took place at a picnic. The defendant being called a vile name by one of the women assaulted her. He, in turn, was set upon by her brothers and the deceased. On escaping from them, he fled, but did not leave the grounds. The deceased seated himself upon a log not far from the scene of the first difficulty, and while sitting there, was assaulted by the half-brother of the defendant, who immediately fled. The deceased then immediatly mounted a horse, and was riding off of the grounds, when, overtaking the defendant, the defendant turned and fired the shot from which he died. Evidence of this assault was admitted, which is assigned as error. There is not disclosed by the record the theory under which it was heard; but, as it is not shown that defendant connived at or knew aught of it, its operation should be confined simply to a showing of why the deceased was on the horse and in explanation of his presence at the scene of the shooting for the purpose of rebutting the inference that he was still pursuing defendant, and an instruction should be given the jury limiting the effect of this evidence to this one end.

Numerous other errors are assigned in the brief of plaintiff in error, some of which relate to the order and manner of the reception of the evidence, but most of them concern the instructions given by the court. These we will not notice as it is not likely that the same errors will be made in a new trial of this cause. The issue is a simple one on an indictment for murder and no complications ought to arise on a new trial in the instructions, and we believe we have settled the uncertainties of the evidence.

The judgment of conviction is set aside, and a new trial is granted defendant.

All the justices concur.

Ex parte THOMAS.

No. 331. Opinion Filed August 29, 1908.

(97 Pac. 260.)

WEAPONS—Regulation—Statutes—Bill of Rights. The provisions of the statutes of Oklahoma (sections 2502, 2503, Wilson's Rev. & Ann. St. Okla. 1903) prohibiting the carrying of the weapons therein set out are not repugnant to each other, or violative of section 26 of article 2 of the Bill of Rights of the Constitution of Oklahoma, but are valid provisions of such statutes extended to and put in force in the state by the provisions of section 21 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) and section 2 of the Schedule of the Constitution.

(Syllabus by the Court.)

Habeas corpus on petition of Richard Thomas. Writ denied.

J. M. Springer, for petitioner.

Chas. West, Attorney General, and *W. C. Reeves, Assistant Atty. Gen.,* for respondent.

DUNN, J. Richard Thomas was charged by information filed in the county court of Payne county, Okla., with the offense of willfully and unlawfully carrying on or about his person a pistol, concealed, contrary to the statute, etc. He was sentenced to pay a fine of $25 and to be incarcerated in the county jail for 30 days, and, on being taken in charge by the sheriff under this sentence, brought this original action of *habeas corpus* in the Supreme Court, praying a discharge. The agreed statement of facts and the briefs of the counsel submit to this court for its consideration and decision the question as to the status of the law in reference to carrying weapons in this state. Counsel for petitioner makes a very ingenious argument on the subject, but in our judgment it is more ingenious than sound. He contends that there is no law in the state of Oklahoma to prevent or regulate the carrying of arms or weapons, and his line of reasoning is as follows: Section 583, c. 25 (section 2502), Wilson's Rev. & Ann. St. 1903, is as follows:

> "It shall be unlawful for any person in the territory of Oklahoma to carry concealed on or about his person, saddle, or saddle bags, any pistol, revolver, bowie knife, dirk, dagger, slung-shot, sword cane, spear, metal knuckles, or any other kind of knife or instrument manufactured or sold for the purpose of defense except as in this article provided."

This section, counsel contends, is repealed by the one which follows it, which reads as follows:

> "It shall be unlawful for any person in the territory of Oklahoma, to carry upon or about his person, any pistol, revolver, bowie knife, dirk knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon, except as in this article provided."

The contention on these two sections is that, if a person is prohibited from carrying weapons at all, he is certainly prohibited from carrying them concealed, and, as the first paragraph and the evil intended is fully included in the second paragraph, the first is rendered inoperative, void, and of no force and effect. He admits that his client carried the pistol mentioned, and he seeks to avoid the force of the second paragraph which prohibits the carrying of any weapons whatever by the provision of the Constitution of the state (section 26, are. 2; section 35, Bunn's Constitution), which reads as follows:

> "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."

Under this section he conceives the idea that his client had the absolute right to carry the pistol for which he is now being punished; that section 2503 is in conflict with this section of the Constitution, and must fall; that section 2502, which prohibits the carrying of weapons concealed, and hence a regulation thereof, and not a prohibition, is in conflict and repealed by section 2503, and hence was not carried into force and effect by section 2 of the Schedule of the Constitution, which provides that:

> "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklamoma until they expire by their own limitation or are altered or repealed by law."

There are certain other provisions of the statute regulating the carrying of weapons and granting permission to the public officers to carry arms, and for other persons to carry shotguns and rifles for hunting or for having them repaired, or for the purpose of using the same in public muster or military drills, etc; also a provision against any one except a peace officer carrying into any church or religious assembly, or to an election or place where intoxicating liquors are sold, and certain other assemblies, any weapon designated in the first and second section above set out. These particular sections are not of moment here, and hence will not be set out at length.

We agree with counsel that the statutes in question cover practically the same subject, with the exception that the first one provides that the instruments mentioned therein shall not be carried concealed, while the second provides that the weapons mentioned therein shall not be carried at all, and the things which are mentioned cover practically the same articles. A loaded cane and a billy are mentioned in the second, and are not mentioned in the first; and a dagger, slung-shot, and sword are mentioned in the first, and not in the latter. With this execption and with the difference first noted, the statutes are practically identical, and why the Legislature incorporated them both in the act we are not able to say, but there is no room for holding that one of these repeals the other. They may both stand, and a party may be prosecuted under either. The second paragraph contains no repeal of the first. They are both contained in the same chapter, and in the same article, were passed on the same day, and the rule in such cases is stated in Lewis' Sutherland on Statutory Construction, § 268, to be as follows:

"The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the Legislature would deliberately pass an act with conflicting intentions. In the other case the presumption rests on the improbability of a change of intention or, if such change had occurred, that the Legislature would express it in a different act without an express repeal of the first. 'Statutes enacted at the same session of the Legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia.* Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session.' The presumption is that different acts passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed."

To the same effect is the holding in the case of *State v. Rackley* from the Supreme Court of the state of Indiana. 2 Blackf. 249:

"Statutes enacted at the same session of the Legislature are to be taken *in pari materia,* and should receive a construction which will give effect to each, if possible. But if each of them cannot have the entire effect when taken in connection with the others that it would have if taken singly, they must be so constructed as to give effect to what appears to have been the main intention of the Legislature.'

In the case at bar these statutes must have been passed as is said by Mr. Sutherland "through inadvertence"; but construing them so as to give effect to what appears to have been the main intention of the Legislature in our judgment will give effect to both, and a prosecutor may proceed under either as the facts require. They are for the greater part cumulative, but not conflicting.

Now the question arises: Were these sections of the territorial statutes extended to, and did they remain in force in the state of Oklahoma, or are they repugnant to that section of the Constitution above cited, relating to the right of citizens to bear arms. The question now presenting itself is whether or not the pistol, for the carrying of which defendant is restrained of his liberty, is among the arms which he could be prohibited from carrying or bearing. Practically all of the states under constitutional provisions similar to ours have held that acts of the Legislature against the carrying of weapons concealed did not conflict with such constitutional provision denying infringement of the right to bear arms, but were a valid exercise of the police power of the state. A few of the states which have so held are indicated as follows: *Nunn v. State,* 1 Ga. 243; *State v. Mitchell,* 3 Blackf. (Ind.) 229; *State v. Reid,* 1 Ala. 612, 35 Am. Dec. 41, *State v. Jumel,* 13 La. Ann. 399; *State v. Wilburn,* 7 Baxt. (Tenn.) 57, 32 Am. Rep. 551; *Cockrum v. State,* 24 Tex. 394; *State v. Buzzard,* 4 Ark. 18. The foregoing authorities could be multiplied, but they are deemed to be sufficient.

The question now arrises: Is a pistol the character of arms in contemplation of the constitutional convention and of the people of the state when they declared that the right of a citizen "to carry and bear arms," etc., "shall never be prohibited." We hold that it is not, and most of the states where it has been passed upon support us in this conclusion. Bishop on Statutory Crimes, § 793; *Andrews v. State,* 3 *Heisk.* (Tenn.) 165, 8 Am. Rep. 8; *Fife v. State,* 31 Ark. 455, 25 Am. Rep. 556; *English v. State,* 35 Tex. 473, 14 Am. Rep. 374; *Aymette v. State,* 2 Humph-(Tenn.) 154;*Hill v. State,* 53 Ga. 472; *City of Salina v. Blaksley,* 72 Kan. 230, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196; 7 Am. and Eng. Ann. Cases, 925. Many of the state Constitutions on this subject contain a reiteration of article 2 of the amendments to the Constitution of the United States that "a well regulated militia being necessary to the security of the free state, the right of the people to keep and bear arms shall not be prohibited." Some of the courts have held that this section applied to the states, as well as the general government, but the ultimate conclusion to which practically all of the courts of the Union have finally arrived, including the United States Supreme Court, is that this amendment is a limitation on the federal government only. *Presser v. State of Illinois,* 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; *United States v. Cruikshank,* 92 U. S. 542, 23 L. Ed. 588; *Fife v. State,* 31 Ark. 455, 25 Am. Rep. 556; *Andrews v. State,* 3 Heisk. (Tenn.) 166, 8 Am. Rep. 8. We have found no constitution containing a provision exactly the same as the one in ours, but the reasons which brought about its adoption and the second amendment to the federal Constitution, and the reasons underlying the motives which have caused it to be written into the different state constitutions, are identically the same. Some of the state courts in cases of this character have examined the history of this provision at length and while we do not deem it necessary to go into this, those who are interested in the subject will find an excellent review of the entire matter in the case of *Aymette v. State, supra,* wherein Justice Green, who delivered the opinion of the court has in a well written opinion, reviewed the same from its earliest appearance in England, and has marked its growth until it appears in the Constitution of the United States and finally in the Constitution of the state of Tennessee. While the language of the Constitution of the different states may vary in terms, yet they have sprung from the same source, and the purposes, aims, and objects to be accomplished by those provisions are identical, the same rule of construction will be applicable. The Constitution of the state of Tennessee in force at the time of the opinion last mentioned was "that the free white men of this state have a right to carry and bear arms for their common defense." The statute under which the defendant in that case was prosecuted read "that if any person shall wear any bowie knife, or Arkansas toothpick, or other knife or weapon, that shall in form, shape or size, resemble a bowie knife or Arkansas toothpick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor." The defendant contended that the statute was unconstitutional and that every man had a right to arm himself in the manner which he chose. The defendant, it appears, had a bowie knife, of which the court in dealing with the question of whether or not such an instrument came within the meaning of the constitutional provision said:

"The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right to keep and bear arms is secured is of general and public nature, to be exercised by the people in a body, for their common defense, so the arms, the right to keep them which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber or assassin. These weapons would be useless in war. They could not be employed advantageously in the common defense of the citizens. The right to keep and bear them is not, therefore, secured by the Constitution."

In a later case (*Andrews v. State, supra,*) the Supreme Court of Tennessee, again dealing with the same subject and speaking through Justice Freeman, said:

"In order to arrive at what is meant by this clause of the state Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is 'arms' (that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country), and such as are adapted to the ends indicated above (that is, the efficiency of the citizen as a soldier, when called on to make good 'the defense of a free people'), and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus use? Not everything that may be useful for offense or defense; but what may, properly be included or understood under the title of 'arms,' taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all descriptions, the shotgun, the musket, and repeater are such arms; and that under the Constitution the right to keep such arms cannot be infringed or forbidden by the Legislature, their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right."

The court in this case considered three cases together, in one of which there was involved, as in the case at bar, the carrying of a pistol. The case of *Hill v. State, supra,* was one wherein the defendant was indicted for carrying a pistol. The provision of the Constitution of Georgia reads:

"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; but the General Assembly shall have power to prescribe the manner in which arms may me borne."

In considering the question as to whether or not the statute which provided that "no person in said state shall be permitted or allowed to carry about his or her person any dirk, bowie knife, pistol, or revolver, or any kind of deadly weapon, to any court of justice or any election ground or precinct," etc., was in violation of the terms of the Constitution, the Supreme Court said:

"The language of the Constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the arms necessary for a militiaman. It is to secure the existence of a well-regulated militia. That, by the express words of the clause, was the object of it, and I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, bowie knives, and those other weapons of like character, which, as all admit, are the greatest nuisance of our day. It is in my judgment a perversion of the meaning of the word 'arms,' as used in the phrase 'the right to keep and bear arms,' to treat it as including weapons of this character. The preamble to the clause is the key to the meaning of it. The word 'arms,' evidently means the arms of a militiaman, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. The very words 'bear arms' had then, and now have, a technical meaning. The 'arms bearing' part of the people were its men fit for service on the field of battle. That country was 'armed' that had an army ready to fight. The call 'to arms' was a call to put on the habiliments of battle; and I greatly doubt, if in any good author of those days a use of the word 'arms' when applied to a people can be found which includes pocket pistols, dirks, sword-canes, toothpicks, bowie knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society can encourage or secure the existence of a militia, and especially of a well-regulated militia I am not able to divine."

The same weapon was involved in the case of *English v. State, supra.* The arms-bearing section of the Constitution of the state of Texas reads: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the Legislature may prescribe." On this the Supreme court of that state, speaking through Justice Walker, said: "We understand the word 'arms,' when used in this connection, as having the same import and meaning which it has when used in the amendment of the federal Constitution." It will thus be seen that the court held contrary to the general rule that the second article to the amendment of the Constitution of the United States is of a nature to bind both the state and national Legislatures, but its construction of the word "arms" is none the less valuable.

"To refer to the deadly devices and instruments called in the statute 'deadly weapons' to the proper or necessary arms of a well-regulated militia is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, which it was doubtless the intention of the Legislature to punish and prohibit. The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols, and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms. The terms 'dirks,' 'daggers,' 'slung-shots,' 'sword canes,' 'brass knuckles,' and 'bowie knives' belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline."

The Constitution of the state of Arkansas on this subject is: "The citizens of this state shall have the right to keep and bear arms for their common defense." The Legislature passed a prohibitory act providing "that any person who shall wear or carry any pistol of any kind whatever, or any dirk, butcher knife or bowie knife, or sword or spear in a cane, brass or metal knuckles, or razor, as a weapon, shall be adjudged guilty of a misdemeanor," etc. The construction of this provision of the laws of that state arose in the case of *Fife v. State, supra,* and the Supreme Court held:

"The provisions of article 2 § 35, of the Constitution of this state, securing to the citizens the right to keep and bear arms for their common defense, relate to such arms as are used for purposes of war; and does not prevent the Legislature from prohibiting the wearing of such weapons as are not used in civilized warfare, and would not contribute to the common defense. The act of February 16, 1875, which prohibits the carrying of any pistol whatever as a weapon, refers to such pistols as are usually carried in the pocket, and of a size to be concealed about the person, and used in private quarrels; and not to such as are within the provisions of the Constitution."

That was a case, as is the one at bar, wherein the carrying of a pistol was involved; the defendant taking the position that the act of the Legislature which prohibited absolutely the carrying of the articles mentioned therein was in violation of the Constitution, and void. The remarks of the court are peculiarly applicable to our own statute:

"From the company in which the pistol is placed, and the known public mischief which the Legislature intended by the act to prevent, it is manifest that the pistol intended to be prescribed is such as is usually carried in the pocket or of a size to be concealed about the person and used in private quarrels and brawls, and not such as is in ordinary use and effective as a weapon of war, and useful and necessary for 'the common defense.' The indications in the evidence are that the plaintiff in error was carrying a pistol of that class or character intended to be prohibited by the Legislature, and which we think may be prohibited in the exercise of the police power of the state without any infringement of the constitutional right of the citizens of the state to keep and bear arms for their common defense."

The case of *City of Salina v. Blaksley, supra,* was another one wherein the question of the right of the defendant to carry a pistol was before the Supreme Court of the state of Kansas for determination. Section 4 of the Bill of Rights of that state is as follows: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace are dangerous to liberty and shall not be tolerated, and the military shall be in strict subordination to the civil power." The statute of the state of Kansas provided that a city council may prohibit and punish the carrying of fire arms or other deadly weapons, concealed or otherwise. The defendant was arrested for carrying a pistol, and his contention was that this section of the Bill of Rights was a constitutional inhibition upon the power of the Legislature to prohibit an individual from bearing arms and that the section of the statute mentioned was in conflict with this constitutional provision, and therefore void. The court held:

"The provision of the Kansas Constitution (Bill of Rights, § 4) that 'the people have the right to bear arms for their defense and security' is a limitation on legislative power to enact laws, prohibiting the bearing of arms in the militia or any other military organization provided for by law, but is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons."

Mr. Bishop in his work on Statutory Crimes, § 793, has this to say on this subject:

"The guaranty to the people of the right 'to keep and bear arms' is largely found in our state Constitutions; in some of them in these words alone, and in others more or less qualified. In reason the keeping and bearing of arms has reference only to war, and possibly also to insurrections wherein the forms of war are as far as practicable observed; yet certainly not to broils, bravado, and tumult, disturbing the public repose, or to private assassination and secret revenge. Nor are these, in the language of the constitutional provision now under consideration, 'necessary to the security of a free state.' Nor yet are dirks, bludgeons, revolvers, and other weapons which are not used in war 'arms.'"

While not contained in the same paragraph with the provision securing the right to bear arms, as in many of the other Constitutions, section 40 of article 5—section 113 of Bunn's Constitution of Oklahoma—provides: "The Legislature shall provide for organizing, disciplining, arming, maintaining, and equipping the militia of the state." Herein is shown clearly that the Constitution contemplates the maintenance of an armed militia, and, taking this in connection with the other provision and the views expressed by the courts from whose decisions we have quoted,and the history of and ends to be attained by the arms-bearing provision, we believe there is no room for doubt that the arms defendant had a right to bear, and which right could never be prohibited him, relates solely to such arms as are recognized in civilized warfare and not those used by the ruffian, brawler, or the assassin, and we are further convinced that the act of the Legislature under which the defendant in this case was arrested, tried, and convicted was not repealed or in conflict with the terms of the Constitution, but was among the valid enactments in force in the territory of Oklahoma at the time of its admission; was neither repugnant to the Constitution nor locally inapplicable; was extended in force in the state of Oklahoma. Hence the application of petitioner herein should be denied.

Hayes, Kane, and Turner, JJ., concur; Williams, C. J., concurs in conclusion.

In re Unger.

No. 219. Opinion Filed December 2, 1908.

(98 Pac. 999.)

1. **MUNICIPAL CORPORATIONS—Taxation—Grant of Taxing Power—Strict Construction.** A grant by the Legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation and the power is denied. All acts beyond the scope of the power granted are void.

2. **SAME—License Tax on "Contractors."** The power being granted by the Legislature to a city of the first class to levy by ordinance an occupation tax on "contractors," **held**, that the term is not sufficiently generic to cover "persons doing contract work," and that that part of an ordinance seeking to levy such tax on "persons doing contract work" is illegal and void.

3. **HABEAS CORPUS—Grounds for Discharge—Void Ordinance.** Habeas corpus will lie to discharge a petitioner restrained of his liberty by virtue of a conviction based upon a void ordinance.

(Syllabus by the Court.)

Application of U. W. Unger for a writ of *habeas corpus.* Writ granted, and petitioner discharged.

F. C. Hunt, for petitioner.

V. S. Decker, for respondent.

Turner, J. On May 28, 1908, petitioner filed in this court an original application for a writ of *habeas corpus,* alleging himself to be illegally restrained of his liberty by C. D. Spencer, city marshall of the city of Chandler, for the nonpayment of a certain fine and costs assessed against him in the police court of said city for the alleged violation of an ordinance thereof which said ordinance he claims is void. The return to the writ shows petitioner to be in the custody of said Spencer, as city marshal of said city, by virtue of an alias commitment from said court directing respondent to confine petitioner in the city jail and keep him so confined until said fine and costs are paid. At that time the city of Chandler was a city of the first class, and the only authority relied on to justify the passage of the ordinance complained of is that part of Wilson's Rev. & Ann St. 1903, Okla., which refers to cities of that class, and provides: "Sec. 386. The city council shall have the authority to levy and collect a license tax on auctioneers, contractors. * * *" Pursuant to this authority, the city council of said city on December 17, 1907, passed an ordinance, the material part of which is as follows:

> "Sec. 1. That for the purpose of raising a revenue for said city there is hereby levied an occupation tax on each and every occupation and business hereinafter named, that are now and may hereinafter be maintained within the corporate limits of the city of Chandler, Lincoln county, Oklahoma. * * * House and sign painting business six ($6.00) dollars per year. * * * Contractors or persons doing contract work twenty ($20.00) dollars per year. * * *"
>
> "Sec. 4. It shall be unlawful for any person, persons, or company or corporation to engage in any of the businesses provided herein without first paying the tax herein specified and provided for and obtaining a license therefor.
>
> "Sec. 5. Any person, persons, company or corporation violating any of the provisions of this ordinance shall upon conviction thereof be fined in a sum of not less than five dollars, nor more than one hundred dollars, and shall stand committed until such fine and costs are paid and each and every day wherein such violation shall continue shall constitute a new and independent offense."

On January 16, 1908, petitioner was arrested on a complaint charging that on January 1, 1908, in the city of Chandler, he, "then and there being, did then and there willfully, unlawfully, and wrongfully do certain contract work, to wit, house and sign painting, doing such work at a contract price and not by the day labor, nor so much per diem, and this without first paying for and taking out an occupation tax license," as provided for in the ordinance aforesaid contrary to section 1 thereof, etc. He was tried, convicted, fined, and committed "until said fine and costs are paid." He insists that the ordinance is void. If so, he must be discharged; otherwise not.

In our opinion that part of the ordinance forming the basis of this prosecution is clearly void, for the reason that it goes beyond the taxing power delegated by the legislature in the section of the statute above set forth. The authority there delegated gave the city the power to tax "contractors." Municipal corporations can exercise only such powers of legislation as are given them by the lawmaking power of the state. Grants of such powers are strictly construed, and "any fairly reasonable doubt is resolved by the courts against the corporation, and the power is denied. * * * All acts beyond the scope of the powers granted are void." 1 Dill. on Munic. Corp. (4th Ed.) § 89. "By the weight of authority, statutes and ordinances imposing licenses and business taxes are to be construed strictly in favor of the citizen and against the government, especially where they provide penalties for their violations" (21 Am. & Eng. Enc. of Law (2d Ed.) § 809), as in this case, and are not to be extended to persons or things not expressly within the grant of power (*Kiel v. City of Chicago,* 176 Ill. 137, 52 N. E. 29). It is also a fundamental cannon of construction that in this connection the lawmaking power must have used the words employed in their known and accepted signification. *Emmons v. City of Lewistown,* 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540.

Tested by these rules, did the grant of power to pass an ordinance levying an occupation tax on "contractors" grant the power to the city to so tax "persons doing contract work"? In other words, is the term "contractors" in the sense in which it was used in the section of the statute, *supra,* sufficiently generic to embrace within its meaning "persons doing contract work"? If so, the ordinance is valid; if not, it is void, and the petitioner must be discharged. In *Brown v. German-American Title & Trust Company,* 174 Pa. 443, 34 Atl. 335, the court adopted the definition of a "contractor," as laid down in the Century Dictionary, to be "one who contracts or covenants either with * * * a public body or private parties * * * to * * * construct works or erect buildings * * * at a certain price or rate." That this is the sense in which the term is commonly understood is apparent, and by it we are persuaded that the Legislature only intended to grant the power to tax the occupations of such building contractors, bridge contractors, railroad contractors, paving contractors, etc., or those engaged in what is commonly known as construction work on a large scale. In this we are borne out by Webster's International Dictionary which defines "contractor" to be "specifically one who contracts to perform work on rather a large scale, at a certain price or rate, as in building houses or making a railroad."

Having thus determined what occupations are fairly taxable under the term "contractors," let us see what fall within the meaning of "persons doing contract work" as distinguished from the former, for to these the city has attempted to extend by this ordinance its power of taxation. It is clear that "persons doing contract work" not only includes contractors themselves, but might fairly be construed to cover in the broadcast acceptation every person engaged in any kind of work pursuant to a contract express or implied. Under its guise, the city might tax all workers for hire whether by job, day, month, or any other time, and might fairly include the trades and professions, the bootblack, the messenger boy, and the maid in the kitchen. The difference in the range of taxation covered by the two terms, and that the first is not sufficiently generic to cover the second, is apparent at a glance. Now let us turn to the complaint, and see what is attempted to be done in this instance. Petitioner therein is charged, not with carrying on the business or being engaged in the occupation of "house and sign painting" (taxed in the same ordinance at $6 per year) without paying the license tax. but with on a certain day "doing certain contract work, to wit, house and sign painting, doing such work at a contract price, and not by the day labor or so much per diem," contrary to the terms of the ordinance. In other words, the complaint charges him with doing an odd job or isolated act of house and sign painting. That such a person is not a "contractor" within the meaning of the ordinance is apparant from what has been said, and also by the distinction drawn by the Supreme Court of Louisiana in *State v. McNally,* 45 La. Ann. 44, 12 South. 117. In that case defendant appealed from a judgment against him in the civil district court of the parish of Orleans compelling him to pay a license tax as "contractor or builder." In distinguishing between contractors and others, the court, in passing, said:

> "To illustrate, we will add that when a mechanic is employed to do a particular piece of work, for instance to do the carpenter work on a house, or to plaster or to paint the same, and he works at his trade on said house and employes others to assist in the work, he is exempt, because he follows and works at his trade exclusively. But, when he undertakes to build houses generally, and only superintends the work and performs only such mechanical labor as his pleasure may dictate, or to show or direct those employed by him, he does not follow his trade exclusively on the building and employing others to assist him, but he is a contractor, employing others to do the work exclusive of his individual labor."

As such a person, then, as is described in the complaint, is clearly not a "contractor," and as the city was without legislative power to extend by ordinance its power of taxation so as to include this isolated act of house and sign painting under a provision therein taxing the occupation of "persons doing contract work," we conclude that that part of the ordinance attempting to tax "persons doing contract work" is illegal and void, and petitioner's conviction, fine, and present restraint are also illegal and void. It would seem that in ordaining a tax on "contractors" or "persons doing contract work" the lawmaking power of the city was attempting to define what occupations were intended to be included under the term "contractors." If such is true, the attempt was futile, as it goes without saying that the city could not extend its powers of taxation by an unauthorized definition of a word contained in the grant of power (*Kansas City v. Lorber,* 64 Mo. App. 605; *Twining v. City of Elgin,* 38 Ill.. App. 356; *Town of Trenton v. Clayton,* 50 Mo. App. 535), and that by defining the word "contractors" as "persons doing contract work" did not make it so. and this court will not be bound by such definition.

While the right of petitioner to invoke the aid of the writ of *habeas corpus* is not before us, if it were, we are inclined to think we would favor the right. We are not unmindful that irregularities in proceedings of this kind before the lower courts are not properly inquired into by *habeas corpus* but on appeal; but where, as in this case, the conviction and consequent restraint are the result of a prosecution based upon a void ordinance, the error is not merely an irregularity, but fundamental, and may be reached by this writ. *In re Gribben,* 5 Okla. 379, 47 Pac. 1074; 15 Am. & Eng. Enc. of Law (2d Ed.) 169, and cases cited; McQuillin, Munic. Ord. p. 574, and cases cited; *Hans Neilsen, Petitioner,* 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

We are therefore of the opinion that that part of the ordinance seeking to impose an occupation tax on "persons doing contract work" is void; that the judgment of the lower court is also void; that the petitioner is illegally restrained of his liberty, and should be discharged; and it is so ordered.

All the Justices concur.

Ex parte CLENDENNING.

No. 268. Opinion Filed September 11, 1908.

(97 Pac. 650.)

COMMITMENT—Sentence and Commitment—Jurisdiction after Discharge. When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment.

Williams, C. J., dissenting.

Application by William Clendenning for writ of *habeas corpus.* Petitioner discharged.

Wade S. Stanfield and Barnum & McGraw, for petitioner.

Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty Gen., for the State.

DUNN, J. This case is an original proceeding in *habeas* *corpus,* brought by William Clendenning, who alleges that he is unlawfully restrained and deprived of his liberty by Henry Clay King, as sheriff of Creek county, state of Oklahoma. From the record in the case we gather that on December 16, 1907, the defendant was brought into the county court of that county, and in case No. 16 the following judgment was entered against him:

> "Defendant appeared in person, but without attorney, and entered a plea of guilty of selling intoxicating liquors, whereupon the court ordered that he be fined $50 and pay costs, amounting to $4.15, a total of $54.15, and to be committed to jail until said fine and costs are paid; and it was further ordered by the court that defendant be confined in the county jail for a period of 30 days, said sentence to be suspended on good behavior."

Thereafter, and on January 21, 1908, the defendant was again arraigned before the court of said county in case No. 68 charged with the same offense, when the court entered against him the following judgment:

> "Defendant waived arraignment and entered a plea of guilty whereupon the court ordered that he pay a fine of $75 and costs, and that he be given 30 days in jail; jail sentence suspended during good behavior. Fine and costs were paid, and defendant was conditionally discharged as shown above."

In neither of these cases was commitment issued.

Thereafter, and on June 27, 1908, after the expiration of the terms of court at which both of the foregoing judgments were rendered, and after the expiration of about five months from the date on which the last judgment was rendered, and six months subsequent to the day of the first, the court pronounced the following judgment in case No. 68:

> "Now, on this 27th day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court, the above matter came on to be heard, and it appearing to the court that on the 21st day of January, A. D. 1908, said defendant was, by judgment of this court then and there rendered adjudged, ordered, and decreed to be imprisoned in the county jail of Creek county, Oklahoma, and it further appearing to the court that said jail sentence was on good behavior of said defendant, and it now appearing to the court, from the records of

this court, that the behavior of said defendant has not been good since said 21st day of January, 1908, the suspension of said jail sentence is hereby set aside and annulled, and the said judgment of this court is hereby this day ordered enforced, and the said defendant is committed to the custody of the sheriff of Creek county, Oklahoma, for imprisonment in said jail for 30 days from and after the date hereof, in conformity with said judgment of this court rendered as aforesaid on said 21st day of January, A. D. 1908. To all of which action of the court the defendant excepts. Whereupon said defendant prayed an appeal to the Supreme Court of Oklahoma, which by this court denied, and the defendant then and there duly excepted. Whereupon said defendant asked the court to fix the amount of appeal bond, which was by the court denied, to which the defendant excepted."

And immediately thereafter, and on the same day, the court rendered the following judgment in case No.17:

"Now, on this 27th day of June, A. D. 1908, the same being one of the judicial days of the regular May, A. D. 1908, term of this court. the above matter came on to be heard, and the same action was taken herein as in No. 68 Criminal, except that the sentence herein was by the court allowed to be concurrent with the sentence in said No. 68 Criminal."

Upon this action by the court and the commitment issued thereunder, the defendant was taken into custody, and this writ was by him sued out to regain his liberty. He contends that after the expiration of the term at which the judgments were rendered, and after the expiration of the time within which they would or could have been served, in the absence of escape on his part, or any appeal or other lawful procedure taken to stay the same, the court lost jurisdiction to issue commitment thereon and to require their enforcement by his imprisonment. This raises the question of whether or not a court, after delivering its judgment and sentence in a criminal case, may stay the same in the absence of appeal or other legal proceedings taken looking to its modification, and after the term at which it was rendered has expired, and after the time embraced therein has elapsed, whether it has jurisdiction to then issue commitment in execution of its judgment and incarcerate the defendant thereunder. In support of the action taken by the court we are cited by the Attorney General to a number of authorities. Those which most nearly touch the proposition, and upon which he most strongly relies, are as follows: *Allen v. State*, 1 Mart. & Y. (Tenn.) 294; *Fults v. State, 2 Sneed* (Tenn.) 232; *Sylvester v. State,* 65 N. H. 193, 20 Atl. 954;*State v. Hatley, et al.*, 110 N. C. 522, 14 S. E. 751; *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; *Weber v. State,* 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

The case of *Allen v. State, supra,* was one decided by the Supreme Court of Tennessee. Allen was convicted of the crime of manslaughter at the circuit court of Green county in September 1826. He was sentenced to be imprisoned six months, and to be branded by burning on the hand, and to pay the costs of the prosecution. He asked for a stay of this judgment to enable him to make application to the Governor for a pardon, and the court in granting it was doubtless greatly influenced by the fact that the burning on the hand, if inflicted, would much impair the privilege granted by a pardon, should one be secured. The judgment was stayed under a statute to enable defendant to make such application. This case is referred to in the case of *Crane v. State,* 94 Tenn. 98, 28 S. W. 317, in which the statute under which the court acted in that case is cited. Defendant Crane made application for a stay of the execution of his sentence until he could likewise apply to the Governor for a pardon, and the Supreme Court of the state in reference to this matter said:

"The power of this court to grant such a suspension in a proper case is clearly given by section 6096, Mill. & V Code, as follows: 'In case of the conviction and sentence of a defendant to imprisonment, the presiding judge may, in all proper cases, postpone the execution of the sentence for such time as may be necessary to make application to the executive for a pardon or commutation of punishment.' This power and discretion was exercised by this court in the case of *Allen v. State,* Mart. & Y. (Tenn.)295. It is apparent, however, from a reading of the statute, that such power and discretion to suspend execution of sentence will only be exercised in proper cases, and will not be extended to cases generally; otherwise, the course of justice would be impeded, and the Governor deluged with applications in all cases before the convicted person could be imprisoned.

The case of *Fults v. State, supra,* was another case from Tennessee, which was decided upon authority of the case of *Allen v State supra.* In that case the defendant was sentenced to a fine of $10 and two days' imprisonment. The fine and costs were secured, and there appears of record the following entry:

> "On motion of defendant, David Fults, and for reasons appearing to the satisfaction of the court by admission of the Attorney General and the evidence in the case, he is permitted to enter into recognizance to appear at the next term of this court and then undergo the imprisonment adjudged against him, and abide by and perform the sentence of the court."

He appeared at the next term of court, and was ordered to be imprisoned pursuant to the judgment. From this he appealed, and the Supreme Court held that there was nothing irregular in the proceeding, and that the execution should go. The stay of the execution, it will be noted, was to a time certain, and there was nothing contingent in it. Where there is no statute, such as in this state, some few of the courts have held that a court may fix a day certain in the future on which a sentence shall begin. This was done in this case, and the Supreme Court sustained it.

The case of *Weber v. State, supra,* in our judgment, is not applicable, for the reason that in that case the judgment, the suspension, and the setting of the same aside all took place at the same term of court. The Supreme Court said:

> "When the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed."

In the case at bar it will be noted that both terms of court at which these judgments were rendered had expired, that no motion for new trial or other proceeding had taken place to review or reverse the same, and the judgments were final so far as the control of the court over them was concerned.

Neither do we consider the case of *State v. Hatley et al., supra,* as controlling in this case. That was a case in which Philip Hatley and his wife were sentenced to be imprisoned for 12 months in the county jail, with the proviso that if the defendants left the state within 30 days no execution should issue; otherwise the defendants were to be imprisoned. The parties left the state, and in about one month returned to the jurisdiction of the court. Thereupon the clerk of the court issued execution upon the judgment that had been previously rendered. In the consideration of the case the Supreme Court of North Carolina said:

> "The court had no power to pass a sentence of banishment, and we think the judgment of the court cannot be fairly construed as a judgment of banishment. If so, it would be void. The only judgment passed by the court was that the defendants be imprisoned 12 months, and the words, 'but if the defendants leave,' etc., constitute no part of the sentence or judgment of the court, but were mainfestly intended only as a note or memorandum directing the clerk to postpone the period at which the sentence shall go into execution, and not as a banishment for the defendants, or an infliction upon some other community, predicated upon the assumption that it would be desirable and beneficial, both to the community in which they were engaged in the bad calling of keeping a disorderly and disreputable house and to the defendants, in giving them an opportunity to reform under new surroundings. Such course is not unfrequent, and, though dictated by the best intentions to benefit the public, as well as offenders, it is not to be commended. We think it quite clear, when the defendants left the state and speedily returned (for it appears that the court was held in the latter part of October and they returned early in December), they came within the condition upon which the clerk was to issue the capias."

The facts contained in the foregoing quotation distinguish that case from the one at bar, in that the court did not stay its judgment or the execution, and that the commitment was issued by the clerk; and this within the period of time during which the defendants, had they been immediately committed, would have been serving their sentence. These facts, we believe, take that case out of the rule controlling the one at bar.

Another case relied upon by the Attorney General, *People ex rel, Forsyth v. Court of Sessions, supra,* was one wherein the Supreme Court of the state of New York by mandamus commanded the Court of Sessions to pronounce judgment in a criminal case wherein one Attridge had been convicted of the crime of grand larceny, in which the trial court, out of respect to his youth and previous good character, had suspended sentence. Three days thereafter the county judge, one of the three judges sitting at the trial, in the absence of the other two, brought the defendant before him and sentenced him to imprisonment. He was released upon *habeas corpus* on the ground that the sentence was not concurred in by a majority of the court. He was remanded to the custody of the sheriff, and again brought before the court, and the judgment thereupon was given that sentence be suspended during good behavior. He was thereupon discharged from custody. Thereafter the Supreme Court granted a peremptory writ of mandamus commanding the said trial court to proceed to judgment and to pass sentence upon the defendant as prescribed by law. On the case being appealed to the Court of Appeals, the court of last resort of the state, it said: "The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction." And the court held that the trial court possessed this power in the following language:

> "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts, and numerous adjudged cases."

The statement of that case will show that it is not applicable to the case at bar, for the reason that the question involved here is not the power to suspend sentence, but the power of the court after sentence to suspend execution.

This case is noted, and the above distinction drawn, in the consideration of the case of *In re Webb,* 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846, which was a case where execution of the judgment of the court, as in the case at bar, was suspended. The *Forsyth Case, supra,* being cited on the part of the state to sustain the power of the court to suspend execution, just as it is cited by the Attorney General in the case at bar, the Supreme Court of Wisconsin said:

The case of *People ex rel, Forsyth v. Court of Sessions,* 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856, was not a case where execution of a sentence had been suspended, but where sentence had been postponed; and the power of the court to delay sentence in its discretion was sustained, and numerous authorities were cited to support it. But the present case involves different considerations. Here the execution of a sentence already pronounced is indefinately suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment, indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the 'ticket of leave' system, without any of its safeguards, leaving the convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it, to the great detriment, it may be, of the interests of the public—a power plainly liable to great abuse."

The case of *Sylvester v. State, supra,* is one wherein the Supreme Court of New Hampshire, in a case on all fours with the one at bar, decided that it was within the power of the court to stay its execution. But one case is relied upon and cited by it to support its opinion, and that is the case of *Commonwealth v. Dowdican's Bail,* 115 Mass. 133. An inspection of that case shows that it was not one wherein the court suspended execution: but it, like the case of *Forsyth v. Court of Sessions, supra,* was one wherein the court suspended sentence. The New Hampshire Supreme Court does not discuss the proposition involved, and cites no other authority to support its opinion. Hence it is practically of little or no weight as an authority.

To supplement the cases presented to us above, we have sought diligently to find other authority; but we have been unsuccessful. Outside of those which the Attorney General has presented to sustain this judgment, we have been unable to find a solitary well-considered opinion. Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that "in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of an uncertain contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence, and after the term, is illegal." *In re Strickler,* 51 Kan. 700, 33 Pac. 620; *In re Bloom,* 53 Mich. 597, 19 N. W. 200; *State v. Murphy,* 23 Nev. 390, 48 Pac. 628; *Tuttle v. Lang,* 100 Me. 123, 60 Atl. 893; *Ex parte Gordon,* 1 Black, 503, 17 L. Ed. 134; *State v. Voss,* 80, Iowa, 467, 45 N. W. 898, 8 L. R. A. 767; *In re Markuson,* 5 N. D. 180, 64 N. W. 939. We will review some of these cases.

The case of *In re Strickler, supra,* was one wherein the defendant pleaded guilty in the district court of Ford County, Kan., to the charge of assault and battery, whereupon the following sentence was pronounced upon him by the court:

> "It is the sentence of the law that you, W. H. Strickler, be by the sheriff of Ford county, Kan., incarcerated in the jail of said county to remain for the space of 90 days from the date of this sentence. It is further ordered by the court that the operation of this sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor, and refrain from becoming intoxicated. It is further ordered, as a condition of this sentence, that whenever the said W. H. Strickler shall violate any one of the above conditions, and upon notice thereof to the sheriff by the prosecuting officer of Ford county, Kan., or by the judge of this court, the said sheriff shall immediately incarcerate the said Strickler in the jail of said county, and he shall remain there committed until the expiration of 90 days from said date of incarceration, and until the costs of this prosecution have been paid by him. The question as to whether the conditions of this suspension have been broken shall be determined by the prosecuting attorney of Ford county, or by the judge of this court, and no judicial investigation shall be required."

After the expiration of the term of court at which this sentence was pronounced, and after the lapse of 90 days, the court issued the following commitment on this sentence to the sheriff of the county:

"An whereas, said defendant, W. H. Strickler has failed to comply with the conditions of said judgment, you are therefore commanded to take and commit said defendant, W. H. Strickler, to the jail of Ford county, Kan., there to remain until said judgment be complied with."

Upon the commitment issued the petitioner was arrested and placed in jail. He sued out in the Supreme Court a writ of *habeas corpus,* and that court, on the consideration of the case, speaking through Mr. Justice Allen, said:

"The question here presented is whether the district court coulde lawfully sentence the defendant to imprisonment in the county jail, and then suspend its execution, to be enforced at some future time, on the happening of a contingency named in the judgment. Section 256 of the Criminal Code (Gen. St. 1901 § 5701) reads: 'Where any convict shall be sentenced to any punishment the clerk of the court in which sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person, or by a general or usual deputy, cause such convict to receive the punishment to which he was sentenced.' While it is usual to delay sentence after conviction until motions for new trials, in arrest of judgment, and the like, are disposed of, and while it is within the power of the court to continue the hearing of such motions, or for any other good and sufficient cause to withhold sentence, yet when a sentence has been pronounced by the court, its operation begins at once, and under the section just quoted it is the duty of the sheriff to immediately proceed to carry the sentence into effect. We are not called on to consider the right of the court, at the term at which the conviction was held, to reconsider or modify its own order. In this case it was attempted to hang a sentence of 90 days' imprisonment over the head of the defendant, to be executed at such time as the prosecuting attorney of Ford county or the judge of the court might see fit. This would leave the defendant in a very uncertain situation. He would be unable to tell for an indefinite period whether he was a free man or a convict, and while the sentence in terms might be but for 90 days' imprisonment, it would be in effect far more severe, because of the uncertainty as to the time of its execution. Such a sentence is wholly unauthorized by law. The commitment issued thereon is illegal, and does not justify the imprisonment of the petitioner. He will be discharged."

The facts in the case of *Tuttle v. Lang, supra,* are stated by the Supreme Court of Maine as follows:

"The petitioner was arrested and brought before the Skowhegan municipal court, charged with the offense of the unlawful sale of intoxicating liquors. Before pleading to the complaint the petitioner, the prosecuting complainant, and the judge came to an agreement by which the petitioner should plead guilty and be sentenced to a fine, costs, and imprisonment, but that no *mittimus* in execution of the sentence should issue until the petitioner should again be guilty of unlawfully selling intoxicating liquors. The petitioner thereupon pleaded guilty, sentence of fine, costs, and imprisonment was imposed, a memorandum of the agreement was noted on the judge's docket, and the petitioner was released from arrest and allowed to go without day, without payment of fine and costs, and without imprisonment. No *mittimus* or other precept in execution of the sentence was issued, or even prepared."

After the expiration of nearly two years the judge, being of the opinion that the petitioner was again unlawfully selling intoxicating liquors, issued commitment on the previous sentence, delivering it to the sheriff, who took the prisoner into custody and committed him to jail. He sued out a writ of *habeas corpus,* and the Supreme Court of Maine on these facts held:

"If, after conviction and sentence, any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a *mittimus* for his commitment. In such case, having completed its judicial functions, it has voluntrily surrendered all further control over the case and person."

The case of *In re Markuson, supra,* was one where on June 29, 1905, the petitioner was convicted of a contempt of court in violating the terms of an injunction order. The syllabus in the case sufficiently states the facts and the judgment to show the holding, and is as follows:

"On June 29, 1895, petitioner was convicted of a criminal contempt of court, and judgment was entered of record against him in substance as follows: 'That petitioner be imprisoned in the county jail of Barnes county for a period of 90 days, commencing with today at noon; that he pay a fine of $200, and if default be made in the payment of the fine he shall be imprisoned as many days as $2 is contained in $200, or 100 days.' Immediately after said judgment was entered the court, of its own motion, made certain orders in the case, which were entered of record, to the effect: First, that in the case an appeal was taken the time should commence to run from the date of the *remittitur* being filed in the district court; second, that the judgment be suspended 30 days, unconditionally, to facilitate an appeal to the Supreme court; third, the court ordered that the bail bond given to secure the petitioner's attendance from day to day during the trial in the district court be and remain valid and binding upon the petitioner, and that petitioner was ordered to obey the further orders of the district court, whether made by the court, or made to conform to orders of the Supreme Court. Held, that the time of said imprisonment began to run at noon on June 29, 1895, and that the several orders purporting to suspend or postpone the operation of the judgment were without authority of law, and null and void."

In the consideration of the case the court recognizes the general rule, supported by practically all of the authorities, that where not controlled by statute, the date for the beginning of the service of the term of imprisonment is not fixed in the sentence, its time will commence to run, when not legally stayed, on the day of sentence. See 25 Am. & Eng. Ency. of Law, 303, note 2. And this, in our judgment, is rendered certain in this state by the terms of our statute (section 5583, Wilson's Rev. & Ann. St. Okla. 1903), which provides that upon the judgment "the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with." The court in the case last cited held that the sentence "began its operation when it was pronounced, and continued to be in full force from that day until it ceased to operate by its own terms."

The reasoning of the Supreme Court of Nevada in the case of *State v. Murphy,* supra, is peculiarly applicable to the case at bar, in view of the fact that their statute is practically the same as our own. This was a case where Murphy had been convicted of selling whisky to an Indian, and a judgment of imprisonment for a term of two years was pronounced against him therefor.

Thereupon Murphy, expressing his intention of taking an appeal, moved the court for a stay of execution and to admit him to bail. The court granted a stay of execution of judgment for 10 days, and ordered that he be admitted to bail in the sum of $3,000. Bond was given in accordance therewith, and Murphy was released from custody. He did not appeal, and on suit being brought on the bond it was contended on the part of the principal and his sureties that the bond was void, because the court had no authority or jurisdiction to make an order staying execution of judgment. In the consideration of this case the court says:

"The contention is that the trial court had no authority to make an order staying the execution of a judgment of imprisonment, and no authority to release or order the release of a defendant, under recognizance or otherwise, after judgment of imprisonment had been rendered against him, except after an appeal therefrom had been taken, and therefore any recognizance given for that purpose and at such time is void. This contention also involves a construction of our criminal practice act, and must be sustained. Section 451 of the criminal practice act (Gen. St. 1885, § 4331) provides that, 'when a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.' ,Section 453 of the same act expressly provides that, if the judgment be imprisonment, the defendant shall forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with. Gen. St. 1885, § 4333. We are unable to find any other provisions of the law bearing directly upon the time and the manner of enforcing the judgment of the district court in cases of this character, or in any manner modifying the same, excepting such provisions as direct the enforcement of such judgment by order of the appellate court on appeal. No discretion is reposed in the district court as to the time its judgment shall become operative and enforceable, and any order thereof in contravention of the direct provisions of the statute above cited is without authority and void, and the release of the defendant, with or without bond, pursuant to such order, is unwarranted, and any bond, recognizance, or bail given for such release for the purpose of such order is without authority and void. * * * In the case at bar the camplaint avers that the defendant was released from custody upon the execution and acceptance of the bail bond. The court had no right no authority, and no power to order a stay of execution or the judgment of imprisonment for any length of time; nor had it any authority to release the defendant from custody, under bail, until he had appealed."

The practical identity of the statutes construed in the foregoing case with our own renders the foregoing decision particularly valuable.

One of the cases, recognized in many of the authorities cited as a leading one on the propositions here involved, is *State v. Voss, supra,* decided by the Iowa Supreme Court. A number of defendants involved in that case were enjoined from unlawfully selling intoxicating liquors. They violated terms of the injunction, and upon the hearing the court found them guilty and adjudged punishment therefor by imprisonment and a fine of $500, and an order was made that they stand committed to the county jail unless the fine and costs were sooner paid. The judgment contained a further condition in this language: "The execution of this judgment is to be suspended during the pleasure of the court; but whenever the court, or one of the judges thereof, so directs, execution and warrant of commitment are to issue." The case was taken to the Supreme Court by certiorari,, and it was contended that the order of the court suspending judgment was void; and the court, through Mr. Justice Beck, in the consideration of this matter said:

"The case is this: We find a judgment for a fine against defendant, which can only be enforced at the pleasure of the court. The judgment is thus suspended, and the state is defeated of the remedy provided by law, upon the exercise of the pleasure of the district court. If the power to do this exists in a case of contempt, it must exist in all cases punishable by fine and imprisonment. The law is no respecter of persons. One violator of law possesses no rights or immunities not held by another. It follows, then, that all fines and penalties prescribed by law may be collected only when it accords with the pleasure of the court in which judgment is rendered therefor. The claim of the validity of the condition of the judgment leads to the most absurd results. It is hardly necessary to say that it is based upon no statute."

The case of *In re Webb, supra,* from the Supreme Court of the state of Wisconsin, was one where the petitioner was convicted of the crime of adultery on the 16th of March, 1894, and was sentenced to pay a fine of $200 and to be committed to the common jail for six months. The defendant paid the costs of the prosecution, and the court directed "that the sentence of imprisonment be suspended until the further order of the court." After the expiration of that term, and after six months had expired, the court ordered that the defendant be required to fully comply with the sentence in payment of the fine imposed and committing him until the same was paid, for a period not longer than six months, in accordance with his previous sentence. An original writ of *habeas corpus* was sued out in the Supreme Court of that state, and in the consideration of that case, Justice Pinney, in holding that the judgment of the court committing the relator to jail under the conditions mentioned was void, said:

"The sole power is vested in the Governor 'to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper.' Const. art. 5, § 6. And the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive. When the sentence was pronounced the defendant was in custody; and it became *eo instante* his duty to pay his fine, and for failure to do so the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he has been committed and is now held in confinement. The sentence has been in part complied with, and the attempted withdrawal indefinitely of the remainder was, we think, without legal warrant and void."

The syllabus of the case is as follows:

"After sentence has been pronounced in a criminal case the court cannot, as a matter of leniency to the defendant, suspend indefinitely its execution. A defendant was sentenced to pay a fine and the costs, and to stand committed to jail until payment, the period of imprisonment being limited to six months; and the court directed that if the costs were paid at once the sentence of imprisonment be suspended until further order. The defendant paid the costs accordingly, but failed to pay the fine. Held, that an order, made more than six months later, that defendant pay the fine and stand committed to jail until payment in accordance with said sentence, was without authority."

Section 143 of Bunn's Constitution of Oklahoma (Const art. 6, § 10) provides:

"The Governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the Legislature, at each regular session, each case of reprieve, commutation, parole, or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction and the date of commutation, pardon, parole or reprieve."

The statutes of Oklahoma relating to the enforcement of judgments in criminal cases are contained in volume 2 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, at chapter 68, and are as follows:

"Sec. 5581 (Sec. 445). When a judgment, except of death, has been pronounced, a certified copy of the entry thereof, upon the minutes, must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution."

"Sec. 5583 (Sec. 447). If the judgment be imprisonment or a fine and imprisonment, until such fine be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with."

From the foregoing provisions of the Constitution, it will be observed that no one within the state is given power to reprieve, commute, parole, or pardon an offender with the exception of the Governor, and it will be further observed that, when judgment has been pronounced, a certified copy of the entry thereof must be forthwith furnished the officer whose duty it is to execute it, and where the judgment is imprisonment the defendant must forthwith by such officer be committed and detained under the execution. There is no latitude allowable under these provisions. They embody the plain, unambiguous letter of the law. Under such statutes, where the execution is not stayed by proper proceedings to reverse, vacate, or modify, service of sentence under a judgment of imprisonment begins on the day on which it is rendered, and continues until fully executed according to law. Nor can there be any doubt of the salutary character of this law. Speedy and certain punishment, following the infraction of a law, best meets its ends and purposes, and leniency, through delay toward an offender, seldom works kindness to him or safety to the public; but where circumstances do arise which render the sentence or operation of the law unduly harsh or cruel, and by reason of its universality the operation of the law is thought to work ill in particular cases, the power is vested in the Governor to reprieve, commute, parole, or pardon, except in certain cases; but he, in the exercise of this right and duty, is hedged around by the provision that he must report his doings thereunder to the Legislature. Such power is not vested in a court, and it is as much within the law as the poorest defendant who appears before it for sentence. Statutes provide penalties for the infraction of law, and where incurred they are not subject to enforcement on the whim, caprice, or discretion of the court; and if a court undertakes to do so, it would lead ultimately, as stated by the Supreme Court of Iowa, to the most absurd results.

Let us look at the facts in this case, and see if this is not true. Our Constitution provides that one who is guilty of unlawfully selling intoxicating liquors "shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense." In the case at bar the defendant, being charged with the violation of this law, in the first case entered his plea of guilty, and the court assessed the minimum fine and imprisonment thereunder, and then, instead of incarcerating him in accordance with the plain terms of the law, deliberately accepted the fine and costs and permitted him to go during good behavior. What do we now find? But a trifle more than a month had elapsed when the same defendant is again before the same court, charged with the same offense, and entered the same plea. Again the court assessed a fine and the imprisonment required under the law, and once more solemnly entered an order releasing the defendant during good behavior. Were such a course permitted to trial courts, and did it recieve the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute, and consummate the results noted. Such enforcement would result in licensing the sale of intoxicating liquors by the payment of fines at stated intervals. This course we cannot sanction. The Constitution will not permit it, and the statute plainly prohibits it. The execution should have issued for the imprisonment of this defendant on the day of his conviction. His incarceration should have taken place under it. That it did not is to be regretted; but the court has no power or jurisdiction after the expiration of the time of the sentence and of the term of court when rendered to call it back and issue a commitment thereunder. We fully concur in the sentiments expressed by Chief Justice Wallin of the Supreme Court of North Dakota in the case of *In re Markuson, supra,* where he says:

"It is an unpleasant duty to enter an order discharging the petitioner from custody, in view of the fact that he was convicted by a competent court, and has not actually suffered the punishment indicated in the final judgment of the court. But our duty is plain, and we may not shirk from its performance."

While in this instance, if we had the power to sanction the execution of the belated commitment, which we have not, it would result in the punishment of one guilty man, yet the conclusion which the law compels will doubtless prevent the escape from punishment of many guilty men in the future;but, whatever the result, it is the law, and the petitioner will be discharged.

Hayes, Kane, and Turner, JJ., concur; Williams, C. J., dissents.

SCHWEDES V. STATE.

No. 46. Opinion Filed February 4, 1909.

(99 Pac. 804.)

INTOXICATING LIQUORS—Interstate Commerce. Under subdivision 3, sec. 8, art. 1, of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, a resident of one state has the right to have shipped to him from another state alcoholic liquors, when ordered by him for his and his family's use, and to keep the same for such use; and the state cannot, under its police power, enact laws so as to substantially hamper or burden such constitutional right to have such shipment made and to receive and retain the same for personal use.

(Syllabus by the Court.)

On certificate from the Criminal Court of Appeals.

William Schwedes was convicted of conveying intoxicating liquor from one place in the state to another, such liquor not having been lawfully purchased as authorized by the Constitution of the state, and he brought error to the Criminal Court of Appeals which court certifies the question to the Supreme Court as involving the construction of Const., art. 1, § 9 (Bunn's Ed. § 499), prohibiting the shipment or conveyance of intoxicating liquor from one place in a state to another, except the conveyance of a lawful purchase. Reversed.

This cause was certified from the Criminal Court of Appeals to this court,. as involving the construction of that part of the Constitution of the state of Oklahoma which prohibits the shipment or conveyance of intoxicating liquors from one place in the state to another place therein, except the conveyance of a lawful purchase. Section 499 of Bunn's Edition of the Constitution (section 9, art. 1, of the Constitution; Gen. St. Ann. Okla., 1908, p. 76).

The plaintiff in error was convicted on the 30th day of December, 1907, in the county court of Grant county, in a prosecution by information which charged that he, the defendant in the trial court, did on the 20th day of December, 1907, in Grant county, unlawfully and willfully carry and convey certain intoxicating liquors, to wit, 12 quarts of whiskey, from one place in said state, to wit, the depot of the Chicago, Rock Island & Pacific Railway Company, in Pond Creek, in Grant county, to another place in said state, to wit, the livery barn of said Schwedes in Pond Creek, said liquors not having been lawfully purchased as authorized by the Constitution of the state of Oklahoma.

The defendant in said court asked for several instructions, which were refused by the court, in words and figures as follows, to wit:

"No. 7. If you find the liquor charged to have been carried by the defendant had just been imported by a common carrier, from some person in another state of this Union, and that the same was imported for the personal use of the defendant, then the defendant had a right to recieve and carry and convey the same to his own house or apartment, in the original package, for his personal use, as long as there was no intent on his part to sell or dispose of the same contrary to law, or to put the same to an unlawful use." "Refused: Exception to defendant. H. H. Rogers, county Judge."

"No. 8. If you find that the liquor which was charged to have been carried by the defendant was in the original package and the property of the defendant, and had been importd from another state or foreign country by a common carrier for his own personal use and consumption, and not for the purpose of sale, barter, or exchange, then you should find the defendant not guilty." "Refused: Exception to defendant. H. H. Rogers, County Judge."

"No. 10. You are instructed that if you find that the defendant did carry the intoxicating liquors charged in the information, and that the same was imported from a foreign state or country, for his own use and consumption and not for the purposes of barter, sale or exchange, then the defendant had a right to receive the same and carry it to his own apartments, in the original package that it was shipped in, so long as he did not convey same for any other use." "Refused: Exception to defendant. H. H: Rogers, County Judge."

These instructions were based upon the testimony of the defendant himself, which is substantially to the effect that he had gotten a box of liquor at the depot at Pond Creek, and had started to take it to his home, and whilst he was on his way thereto he was arrested by the sheriff of Grant county and taken to his livery barn, where the box was opened and the contents seized by the officer; that the liquor he was carrying was shipped to him by Stulz Bros., liquor dealers, at Kansas City, Mo., that said liquor was shipped to him by said Stulz Bros. in the pursuance of an agreement had with a salesman in the employ of said Stulz Bros., who stated to said defendant that he would send him something to drink Christmas; that he got the liquor for himself and family, for their own use, for a "Christmas drink," as said by the defendant.

The requested instructions on the part of the defendant in the trial presented the question of the right of a person to purchase in good faith for his own use, intoxicating liquors in a foreign or another state, and have same sent to him by express or other means of transportation, and whether the consignee might go to the express office or depot and receive the liquor so purchased and carry same to his residence for his use.

The refusal of the trial court to give the instructions requested is assigned as error in the Criminal Court of Appeals, and it was considered by that court that the construction of the Constitution is brought into quesion, and this proceeding is by virtue of the provisions of section 2, art. 1, c. 28, p. 291, of the Session Laws of Oklahoma, 1907-08 (section 2214, art. 12, Gen. St. Ann. Okla., 1908) certified to this court.

S. P. Ridings, for plaintiff in error.

Fred S. Caldwell, special counsel, for the State.

WILLIAMS, C. J. (after stating the facts as above). It is insisted by the plaintiff in error that the portion of the prohibition article which provides that "any person, * * * who shall ship, or in any other way, convey such liquors from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized, shall be punished, * * *" is repugnant to the third clause of section 8, art. 1, of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, wherein the power is delegated to the Congress of the United States to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Under the provisions of said prohibition article, there is an attempt to prevent all persons from shipping, or in any way conveying, intoxicating liquors from one place within this state to another place therein, except a purchase from the state agency. On the part of the defendant in error, it is insisted that that portion of the act of Congress approved August 8, 1890, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," otherwise known as the "Wilson Act" (Act. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), permits the adoption and enforcement of said provision in the prohibition article. It reads as follows:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the law of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In the case of *Vance v. Vandercook Company*, 170 U. S. 452, 18 Sup. Ct. 679, 42 L. Ed. 1100, Mr. Justice White, in delivering the opinion of the court, said:

> "But the right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right, or they do not. If they do, * * * then they are void. If they do not, then there is no lawful ground of complaint on the subject. We are thus brought to examine whether the regulations imposed by the state law on the right of the residents of other states to ship into the state of

South Carolina alcoholic liquor to the residents of that state, when ordered by them for their own use, are so onerous and burdensome in their nature as to substantially impair the right; that is, whether they so hamper and restrict the exercise of the right as to materially interfere with or, in effect, prevent its enjoyment."

The court further said, on page 456 of 170 U. S., page 681 of 18 Sup. Ct. (42 L. Ed. 1100):

"Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law to be valid must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment."

In the case of *Heyman v Southern Ry. Co.*, 203 U. S. 277, 27 Sup. Ct. 107, 51 L. Ed. 178, Mr. Justice White, in delivering the opinion of the court, said:

"And in this case we deal only with the power of the state to enforce its police regulations against goods of the character of those enumerated in the Wilson act, the subject of interstate commerce, before delivery. We must not be understood as in any way limiting or restricting the ruling made in *Vance v. Vandercook Co.,* * * * upholding the right of a citizens of one state to bring from another state into the state of his residence, and keep therein, for his personal use, the merchandise referred to in the Wilson act. In other words, as in the case at bar, delivery had not taken place when the seizures were made, and the control of the state over the goods had not attached. We are not called upon to consider whether, if the power of the state had attached by delivery, the state might not have levied upon the goods on the charge that they had not been *bona fide* brought into the state, and were not held by the consignees for their personal use, and therefore, were not within the ruling in *Vance v. Vandercrook.* * * *"

The principle of law covered by the instructions was within the rule as announced by Mr. Justice White in *Vance v. Vandercook Co.,* and *Heyman v. Southern Railway Co., supra,* in construing said part of the Wilson Act and the interstate commerce clause of the Constitution.

It is not essential for the decision of this case that we pass upon the following questions: (1) After delivery has been made by the carrier to the consignee, under the laws in Oklahoma, can the state levy upon said goods on the charge that they have not been *bona fide* brought into the state, and held by the consignee for his personal use or that of his family? (2) Although such goods may not be brought into the state for the personal use of the consignee or his family, but for the purpose of sale, which is prohibited under the state law, can such consignee be prevented from receiving and transmitting the same to his home, place of business, or storage house? These questions are reserved.

The instructions are at all events sufficiently favorable to the state. It follows that the instructions numbered 7, 8, and 10, requested by the defendant in the trial court, should have been given.

All the Justices concur.

ARIE v. STATE.

No. 11. Opinion Filed February 2, 1909.

(100 Pac. 23.)

1. **INTOXICATING LIQUORS—Constitutional Law—Adoption of Constitutional Provisions—Submission to Vote—Presumption of Regularity.** The prohibition article, which was separately submitted with the Constitution for ratification or rejection, the party assailing the same failing to point out in what particular it was not properly submitted in accordance with Enabling Act June 16, 1906, c. 3335, 34 Stat. 267, it having been declared adopted and accepted and recognized by the political departments of both the federal and state governments, will not be declared by the courts invalid, on the ground that it was not properly submitted or adopted.

2. **INTOXICATING LIQUORS—Constitutional Law—Construction—Similar Language in Different Provisions—Obligation of "Contracts"—License—Schedule of Constitution—Repeal of Law Authorizing License—Effect.** It was the intention of the framers of the Constitution that the prohibition provision, required to be incorporated therein by virtue of paragraph 2, sec. 3, Enabling Act June 16, 1906, c. 3335, 34 Stat. 269, should be enforceable in the courts of the state immediately upon the admission of the state into the Union.

2a. Such provision was incorporated in section 7, art. 1 (Bunn's Ed.

sec. 9) by the framers thereof with a like intent.

2b. The prohibition article (Bunn's Ed. sec. 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162) was submitted as a separate proposition, with the intention that it should become effective over the entire state in like manner, if approved by the people and the Constitution was also ratified.

2c. A license issued under a general statute to a dealer in liquors is in no sense a "contract" between the state and the licensee, and is not protected by the contract clause of the federal Constitution, being a mere permit which may be modified, annulled, or revoked at the pleasure of the legislative power.

2d. A schedule to a Constitution generally contains temporary provisions for the preparatory machinery necessary to put the principles of the government under the Constitution in motion without disorder or collision, not as a rule to control the principles of the organic law, or to limit the same, but to carry the whole into effect without break or interval.

2e. The laws licensing the liquor traffic (article 1, c. 49, Wilson's Rev. & Ann. St. 1903), at the time of the admission of the state into the Union, were repugnant to the provisions of the prohibition article thereof, and were not extended to, and did not remain in force in, said state.

2f. A license to carry on the liquor traffic is revoked or annulled by the repeal of the law authorizing the granting of such license.

2g. A liquor license, the period for which it was issued not having expired when the state of Oklahoma was admitted into the Union. was revoked and discontinued on the admission of said state; the prohibition article thereof becoming then and there effective.

(Syllabus by the Court.)

Certified Questions from Criminal Court of Appeals.

Nick Arie was convicted of an unlawful sale of liquor, and he brought error to the Criminal Court of Appeals. which court certifies to the Supreme Court questions involving the construction of the prohibition articles of the Constitution. Questions answered.

On the 14th day of December, A. D. 1908, the Criminal Court of Appeals certified to this court two questions, as will hereinafter appear in the body of the opinion, in which the construction of the prohibition article of the Constitution of the state is brought into question.

James F. Steck and *Stevens & Meyers,* for plaintiff in error.

W. C. Reeves, Asst. Atty. Gen., for the State.

WILLIAMS, J. 1. "Was the constitutional provision with reference to the prohibition of the manufacture, sale, giving away, or otherwise furnishing intoxicating liquors and designated in the record as the 'prohibition amendment to the Constitution' properly submitted to the people for their ratification or rejection, as required by the provisions of the act of Congress known as the 'Enabling Act,' entitled 'An act to enable the people of Oklahoma and the Indian Territory to form a Constitution and state government, and be admitted into the Union on an equal footing with original states,' etc., approved June 16, 1906, c. 3335, 34 Stat. 276."

Section 4 of the enabling act (c. 3335, 34 Stat. 271) provides that:

"In case a Constitution and state government shall be formed in compliance with the provisions of this act, the convention forming the same shall provide by ordinance for submitting said Constitution to the people of said proposed state for its ratification or rejection at an election to be held at a time fixed in said ordinance, at which election, the qualified voters of said proposed state shall vote directly for or against the proposed Constitution, and for or against any provisions separately submitted. The returns of said election shall be made to the Secretary of the territory of Oklahoma, who, with the Chief Justice thereof and the senior judge of the United States Court of Appeals for the Indian Territory, shall canvass the same, and if a majority of the legal votes cast on that question shall be for the Constitution, the Governor of Oklahoma Territory and the judge senior in service of the United States Court of Appeals for the Indian Territory shall certify the result to the President of the United States, together with the statement of the votes cast thereon, and upon separate articles or propositions and a copy of said Constitution, articles, propositions and ordinances. And if the Constitution and government of said proposed state are republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of said election and the statement of votes cast thereon and a copy of said Constitution, articles, propositions, and ordinances, to issue his proclamation announcing the result of said election, and thereupon, the proposed state of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states. The original of said Constitution, articles, propositions and ordinances, and the election returns, and a copy of the statement of the votes cast at said election, shall be forwarded and turned over by the Secretary of the territory of Oklahoma to the state authorities of said state."

There is no contention that the convention had not the authority to submit the prohibition article as a separate proposition.

On the 16th day of November, A. D. 1907, the President of the United States issued his proclamation, which is, in part, as follows:

"Now therefore, I, Theodore Roosevelt, President of the United States of America, do in accordance with the provisions of the said act of Congress of June 16, one thousand nine hundred and six, declare and announce that the result of said election, wherein the Constitution formed as aforesaid, was submitted to the people of the proposed state of Oklahoma for ratification or rejection, was that the said Constitution was ratified, together with the provision for state-wide prohibition, separately submitted at said election, and the state of Oklahoma is to be deemed admitted by Congress into the Union, under and by virtue of said act, on an equal footing with the original states."

Plaintiff in error has failed to point out in what particular the same was not properly submitted, but see the following authorities: *Miller v. Johnson,* 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524; *Luther v. Borden,* 7 How. 1, 12 L. Ed. 581; *Prohibitory Amendment Cases,* 24 Kan. 700; *Kadderly v. City of Portland,*, 44 Or. 118, 74 Pac. 715, 75 Pac. 222. Where a proposition has been submitted separately, at the same time with the Constitution, for ratification or rejection, and declared carried and accepted and recognized as properly adopted by the political departments of both the federal and state governments, and the party assailing the part claimed to be invalid on the ground that it was not submitted as required by the enabling act fails to point out wherein the same was not properly submitted for ratification or rejection, the courts will not in that event, if at all, declare the instrument, or any part of it, invalid for not having been properly submitted or adopted.

2. "Was the liquor license, held by the employer of the plaintiff in error as a bartender, revoked by the adoption of the Constitution of Oklahoma, or continued in force in the state of Oklahoma for the period for which it was issued, by virtue of the provisions of section 1 of the schedule of the Constitution?"

For the purpose of ascertaining the intention of the framers of a Constitution we look at the entire instrument. The prohibition article (Bunn's Ed. § 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162), pursuant to section 4, *supra,* of the enabling act was submitted separately at the same time the main body of the Constitution was submitted for approval or rejection; if approved to become a part of the main instrument, in the event of its approval. Said article provides that:

"The manufacture, sale, barter, giving away or otherwise furnishing, except as herein provided, of intoxicating liquors within this state or any part thereof, is prohibited for a period of twenty-one years from the date of the admission of this state into the Union, * * * upon the admission of this state into the Union these provisions shall be immediately enforceable in the courts of the state."

Section 3, Par. 2, of the enabling act, requires that a prohibition provision, containing practically the foregoing excerpt, should be incorporated in the Constitution of the proposed state, to apply to that portion of said state then known as the "Indian Territory," the "Osage Indian Reservation," and such as existed as Indian reservations on the 1st day of January, A. D. 1906, and to continue in force for the period of 21 years from the date of the admission of the state into the Union, and thereafter until the people of said state should otherwise provide by amending the Constitution and proper state legislation. Said provision was accordingly incorporated in said instrument. Section 7, art. 1 (section 9, Bunn's Ed.) Snyder's Ed. p. 16; Gen.

St. Ann. Okla. 1908, p. 77. With a view that such provisions might extend to the entire state, if approved by a majority of the electors thereof voting thereon, it was submitted as a separate provision, if approved to become a part of the main instrument, if ratified. Prior to the 1st day of January, A. D. 1906, and even up to the 16th day of November, A. D. 1907, intoxicating liquors were not permitted to be sold in the Indian Territory, the Osage Indian Reservation, or any other Indian reservation within the territory now embraced in the state of Oklahoma. This requirement of section 3, par. 2, *supra*, was a precautionary act on the part of Congress to continue in force, until the people of the state should otherwise provide in accordance with law, the prohibition of the sale of intoxicating liquors in the territory embraced in said state where prior thereto same had been prohibited.

Where the same language is used in different provisions, or different places in a Constitution the presumption is that it was with the same meaning, unless the context or contemporaneous circumstances should clearly indicate otherwise. It was the purpose in the incorporation of the provisions of section 7, art. 1, *supra*, that the same should go immediately into effect as to such portion of the state, and that no intoxicating liquors should under any circumstances, except as therein provided, be sold. "The most universal and and effectual way of discovering the true meaning of a law is by considering the reason and spirit of it, or the cause which moved the legislature to enact it." 1 Bl. Com. 61. Now why is not the same language as used in the prohibition article (Bunn's Ed. § 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162) to be construed to the same effect as the other provision, to wit, that such prohibition article should, immediately upon the admission of the state, be enforceable in the courts of said state? It is contended that the Schedule to the Constitution (section 449, 450. Bunn's Ed.; Snyder's Ed. p. 380; Gen. St. Ann. Okla. 1908, p. 153) provides that: "In order that no inconvenience may arise by reason of the change from the forms of government now existing in the Indian Territory and the territory of Oklahoma, it is hereby declared as follows: "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the forms of government, but shall continue as if no change in the forms of government had taken place. * * *" and for this reason the liquor license remains in force after the admission of the state into the Union, until it expires of its own limitation. To determine the meaning of this provision of the Schedule and the intention of the framers it would not be amiss to consider what the office of a Schedule is. It is a temporary provision for the preparatory machinery necessary to put the principles of the government under the Constitution in motion without disorder or collision, not to control the principles of the organic law or to limit the same where it may be in conflict therewith, but to carry the whole into effect without break or interval; to shift the machine gradually into another track, and, having done its office, it is stowed away in the lumber room of the government. *Commonwealth v. Clark* (Pa.) 7 Watts & S. 133. The entire instrument is to be examined in arriving at the meaning of any part thereof, and to be construed as a whole. Effect is to be given, if possible, to each section, clause, and word; and, if any part be doubtful, it must be interpreted with every fair intendment to harmonize with the main purpose, and not to defeat it. *Mabury v. Madison,* 1 Cranch, 174, 2 L. Ed. 60; *Bryan v. Menefee,* 21 Okla. 1, 95 Pac. 471; *Trapp v. Wells Fargo Express Co.,* 22 Okla.—, 97 Pac. 1003.

If the public safety or public morals require the discontinuance of traffic in the sale of intoxicating liquors, the hand of the Legislature cannot be stayed in providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All such rights are held subject to the police power of the state. *Beer Co. v. Mass.,* 97 U. S. 32, 24 L. Ed. 989. The weight of authority is overwhelming that no immunity, by virtue of any constitutional provision, either federal or state, exists so as to prevent the state Legislatures from regulating, and even prohibiting the traffic in intoxicating drinks.

Bartemeyer v. State of Iowa, 85 U. S. 129, 21 L. Ed. 929; *Mugler v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273 31, L. Ed. 205. A liquor license granted under the exercise of the police power of the state is subject at all times to be annulled or revoked at the pleasure of the Legislature. *Powell v. State,* 69 Ala. 10; *Fell v. State,* 42 Md. 71, 20 Am. Rep. 83; *Kresser v. Lyman* (C. C.) 74 Fed. 765; *Board v. Barrie,* 34 N. Y. 659; *People v. Murray,* 149 N. Y. 367, 44 N. E. 147, 32 L. R. A. 344. A license to carry on the liquor traffic is revoked or annulled by the repeal of the law authorizing the granting of such license, or by any change in the legislation of the state or district inconsistent with the further exercise of the right conferred by the license, such as the adoption of a prohibitory amendment to the Constitution, statute, or a local option law. *Prohibitory Amendment Cases,* 24 Kan. 700; *State v. Tonks,* 15 R. I. 385, 5 Atl. 636; *Pleuler v. State,* 11 Neb. 547, 10 N. W. 481; *Hirn v. State,,* 1 Ohio St. 15; *Hogan v. Guigon* (Va.) 29 Grat. 705; *Kresser v. Lyman* (C. C.) 74 Fed. 765; *Brown v. State,* 82 Ga. 224, 7 S. E. 915; *State v. Mullenhoff,* 74 Iowa, 271, 37 N. W 329; *State v. Holmes,* 38 N. H. 235; *State v. Cooke,* 24 Minn. 247, 31 Am. Rep. 344; *Ex parte Lynn,* 19 Tex. app. 293; *Robertson v State,* 12 Tex. app. 541; *Moore v. State,* 16 Miss., 137; *Sprayberry v. Atlanta,* 87 Ga. 120, 13 S. E. 197.

In the case of *Criswell v. Montana Central Ry. Co.,* 18 Mont. 172, 44 Pac. 525, 33 L. R. A. 554, the court held that by a Schedule rights were preserved, and it operated of itself to keep in force a system of laws for the government of the state, unless such laws were inconsistent with the Constitution. But that, as to such repugnant statutes, it operated as an effective repeal, for when the Constitution became the fundamental law, acts in conflict with it yielded; and when the question of a conflict is presented to the court, and the conflict clearly appears, the statute must be decided to be inoperative and void. In the case of *Watsl v Montana Central Ry. Co.,* 24 Mont. 170, 61 Pac. 9, the court in construing section 1 of the Schedule to the Constitution, which is substantially the same as ours, said:

"The Constitution operated upon the statute so as to prevent other rights from accruing thereunder, but under its saving clause, as expressed in the section of the Schedule quoted, the right already accrued was preserved to be enforced 'under the laws of the state,' whatever they might be; for, after the right became fixed its enforcement no longer depended upon the statute, but was to be governed by the general provisions of the Code, suitable to the enforcement of all rights, without regard to their origin. This being our conclusion, it is not necessary to discuss what would have been the effect upon plaintiff's right in the absence of this section of the Schedule. An inquiry upon this subject would necessarily lead to an examination of the question whether the right asserted by the plaintiff under the statute is 'property' within the meaning of the fourteenth amendment of the Constitution of the United States, and whether the section of our Constitution (section 2, art. 15), which repealed the statute, is within the malediction of the first section of that amendment."

Sections 1 and 9 of the Montana Schedule are substantially the same as sections 1 and 2 of that of Oklahoma.

It is earnestly insisted by counsel for the plaintiff in error that the privilege of engaging in the liquor traffic by virtue of a license is right; but, under the authorities heretofore referred to, it is only such a right or privilege as is subject to be discontinued at the will of the legislative power. The laws permitting the license of the liquor traffic (article 1, c. 49, Wilson's Rev. & Ann. St. 1903), at the time of the admission of the state into the Union, were repugnant to the provisions of said prohibition article of the Constitution, and consequently did not extend to and remain in force in the state of Oklahoma after the admission of the state. Section 2, Schedule to Const. Okla.; section 451, Bunn's Ed.; Snyder's Ed. p. 381; Gen. St. Ann. Okla. 1908, p. 153. The law under which the license existed having failed, the right to continue business thereunder ceased. The validity of the license ceased with the repeal of the law by virtue of which it came into legal existence; the proclamation admitting the state of Oklahoma into the Union striking down the liquor license law, which prior to that time existed in Oklahoma Territory.

In the case of *Allsman et al. v. State of Oklahoma,* decided by this court on May 13, 1908, 21 Okla. 142 (95 Pac. 468, 16 L. R. A. [N. S.] 511), it was held that in any action to recover a certain sum the unearned portion of a license fee, paid by licensees to licensor while a city of the first class, organized and existing under the laws of the territory of Oklahoma, for a license duly issued to sell malt, spirituous and vinous liquors, the petition which states that by reason of the ratification and adoption of the Constitution of the State, together with the prohibitory clause as a part thereof, by vote of the qualified electors of said proposed state on September 17, 1907, prohibiting the sale of such liquors within said territory upon its admission into the Union, and that said city since that time, without fault of the licensees, forced said licensees to close their place of business and cease to sell such liquors under their said license, under threats of prosecution, sufficiently states a cause of action, and a demurrer thereto was improperly sustained. The question raised here was not discussed in that case, but it was necessary to assume that such license was revoked by the adoption of the Constitution before Oklahoma city would have had a right thereby to prevent, by prosecution, such parties from carrying on their business, under such license, on the ground of the adoption of said prohibition article. We conclude that the rights referred to in section 1 of the Schedule to the Constitution do not include such rights as the exercise of which depends upon a law, the repeal of which abrogates the continuance of such right, when the continuance of same is repugnant to the spirit, as well as the letter, of the Constitution. *Cusic v. Douglas,* 3 Kan. 123, 87 Am. Dec. 458.

We accordingly conclude that a liquor license, the time for which it was issued not having expired at the time the state of Oklahoma was admitted into the Union, was revoked and discontinued when said Constitution became effective.

All the Justices concur.

Ex parte McNAUGHT.

No. 598. Opinion Filed February 23, 1909.

(100 Pac. 27.)

1. **CONSTITUTIONAL LAW—Self-Executing Provisions—Prosecution of Felony by Information.** Section 17, art. 2 (Bill of Rights), of the Constitution of Oklahoma (Bunn's Ed. sec. 26), which provides that: "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination"—is effective, and, as supplemented by the provisions of the common law in force in this jurisdiction (Wilson's Rev. & Ann. St. 1903, c. 66. art. 1, sec. 4200), and chapter 68, art. 5 (Cr. Proc.) Wilson's Rev. & Ann. St. 1903, sections 5216-5303, supplies a sufficient rule by means of which the right given under said section may be exercised or enforced.

2. **SAME—Adoption of Constitution—Operation as to Laws Previously in Force—Repugnant Statutes.** Section 17, art. 2 (Bill of Rights), of the Constitution (Bunn's Ed. sec. 26) being self-enforcing, at all events to the extent that the prohibition therein declared became immediately effective, to the effect that prosecutions for felonies shall be had by means of indictment or information, section 5304, Wilson's Rev. & Ann. St. 1903, providing that no person shall be prosecuted for felony in the district courts except by indictment, being repugnant thereto, was not extended to, and did not remain in force in, the state of Oklahoma after its admission into the Union.

3. **SAME—Due Process—Criminal Prosecutions—Preliminary Examination.** Chapter 66, art. 1. sec. 4200 (Civ. Proc.) Wilson's Rev. & Ann. St. 1903, declares that the common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma and chapter 68, art. 5 (Cr. Proc.) Wilson's Rev. & Ann. St. 1903, sections 5216-5303, makes provision for the examination, by a magistrate, of the accused, who is to be present and allowed a reasonable time and means to send for or procure counsel, and the right of cross-examination of the witnesses produced on the part of the prosecution, and of producing witnesses to be sworn and examined on his behalf. Such depositions taken on such examination and the statement of the defendant, in the event he elects to be sworn and testify or make a statement in his own behalf. must be kept by the magistrate or his clerk until they are turned over to the proper court, and must not be permitted to be inspected by any person except the judge of a court having jurisdiction of the offense, the prosecuting attorney, and the defendant and his counsel. After hearing all the evidence or statements, if it appears to such magistrate that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, such accused shall be ordered to be held

to answer such charge. Held, that a conviction upon an information for manslaughter in the first degree, and a sentence to the penitentiary for the term of his natural life on such verdict, are not illegal by virtue of the provision of the Constitution of the United States, which prohibits the states from depriving any person of life, liberty, or property without due process of law.

(Syllabus by the Court.)

Application by George W. McNaught for a writ of *habeas corpus.* Writ denied. Prisoner remanded.

On the 11th day of January, A. D. 1909, the relator filed his petition in this court, alleging that on the 28th day of September, A. D. 1908, at a regular term of the district court of Kingfisher county, state of Oklahoma, the county attorney of said county filed in said court a certain information in two counts, charging him with the crime of murder and manslaughter. That thereafter, to wit, on the 29th day of September, A. D. 1908, relator appeared in open court, and entered his plea of "not guilty" to the charge under said information. That during said term of court the relator was placed on trial, and on the 20th day of October, A. D. 1908, the jury returned into open court its verdict in said cause, in words and figures as follows, to wit: "We, the jury in the above-entitled cause, do upon our oaths find the defendant, George W. McNaught, guilty of manslaughter in the first degree, as charged in the second count of the information." That on the 23d day of October, A. D. 1908, relator's motion for a new trial was overruled by said court, and exceptions allowed, and sentence was then and there pronounced against him upon the verdict of the jury, sentencing him to imprisonment in the state prison for the term of his natural life. Thereupon the relator was notified by the district court of his right of appeal to the Criminal Court of Appeals of the state of Oklahoma, and his bail was fixed in the sum of $15,000, and allowed 30 days from that date within which to give said bond, with sufficient sureties, to be approved by the clerk of said court, and he was further allowed 120 days from said date within which to file petition in error in said Criminal Court of Appeals, and further allowed 90 days therefrom within which to make and serve a case-made for such appeal, with 10 days thereafter to the state of Oklahoma to suggest amendments thereto; said case-made to be settled and signed upon 5 day's notice in writing by either party. thereto.

On the 7th day of December, A. D. 1908, relator applied to the Criminal Court of Appeals of the state of Oklahoma for a writ of *habeas corpus,* which was issued and made returnable before said court, and on the 11th day of January, A. D. 1909, said court discharged said writ, and remended relator to the custody of the sheriff of Kingfisher county, state of Oklahoma. Thereupon said prisoner applied to this court for a writ of *habeas corpus.*

F. P. Whistler and *D. K. Cunningham,* rof relator.

Chas. West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., *M. W. Huch,* and *Bradley & Bradley,* for respondent.

WILLIAMS, J. (after stating the facts as above), The relator, having invoked the jurisdiction of the Criminal Court of Appeals by writ of *habeas corpus,* and the prisoner being remanded by said court to the proper custody (*In re McNaught,* post. Part II., 99 Pac. 241), the jurisdiction of this court, by such writ is now invoked. The question arises as to whether or not section 17, art. 2, (Bill of Rights), of the Constitution (Bunn's Ed. § 26), which provides that: "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination"—is effective without legislation. Section 1, art. 14, of the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of said article also provides:

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed," etc.

Mr. Cooley, in his admirable work (Cooley's Const. Lim. [7th Ed.] pp. 119, 120), says:

"The fifteenth amendment provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.' To this extent it is self-executing, and of its own force abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that 'Congress shall have power to enforce this article by appropriate legislation,' it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose."

Section 2, art. 12, of the Constitution of Kansas, 1859, provides:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, or corporations for religious or charitable purposes."

In the case of *Whitman v. National Bank of Oxford*, 176 U. S. 562, 20 Sup Ct. 477, 44 L. Ed. 590, Mr. Justice Brewer, in delivering the opinion of the court, said:

"This liability is for the dues of the corporations, and to an amount equal to the stock owned by him. The word 'dues' is one of general significance, and includes all contractual obligations. Whether broad enough to include liabilities for torts, either before or after judgment, is not a question before us, and upon it we express no opinion. The words 'shall be secured' are not merely directory to the Legislature to make provision for such liability, but of themselves declare it. To this extent the Constitution is self-executing. *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. The discretion of the Legislature extends beyond this, as indicated by the clause 'and such other means as shall be provided by law.' A failure of the Legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the Legislature prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.' Lamar, Justice, in *Lake County v. Rollins,* 130 U. S. 662, 9 Sup. Ct. 651, 652, 32 L. Ed. 1060."

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. *State v. Scales,* 21 Okla., 683, 97 Pac. 587; Cooley's Const. Lim. (7th Ed.) p. 121.

In the case of *Mc Donald v. Patterson,* 54 Cal. 246, a portion of section 19, art. 11, of the Constitution of 1879, was under review. It is in words and figures as follows:

"No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to the benefits on the property to be affected or benefitted shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

The court said:

"It is conceded that the cost and expense of the sewer to be constructed under the alleged contract is, by the terms of the statute under which this contract was awarded, chargeable, and must be assessed, upon private property by special assessment. Of this meaning of the statute we entertain no doubt. It is contended before us that the street law act of April 1, 1872 (see Stats. 1871-72, p. 804), is continued in force by the first section of article 22 of the Constitution, inasmuch as it is only inconsistent with provisions of the Constitution which require legislation to enforce them; that the act referred to is a system for the improvement of the streets, and the intention manifested by the section of the Constitution referred to is that the system under this act of the Legislature shall be operative until the Legislature shall adopt another system under the Constitution, observing in such system the prohibition of the nineteenth section of article 11, that should the Legislature, however, fail to adopt such new system, the former one ceases to be of force on the 1st day of July, 1880. * * * The language of section 19, art. 11, is both mandatory and prohibitory in its character. It is clear and unambiguous. It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue we are at a loss to determine. It says, as plainly as words can disclose: 'We command that no such work as that referred to shall at any time be done, except as herein set down, and we prohibit any such work from being done at any time in any other way.' It is mandatory and prohibitory to every department of the government, and every officer of each department. By its very terms it is binding upon all, and goes into effect as soon as the Constitution becomes the organic law, as it is strongly prohibitory. We could not hold otherwise, without disregarding the plain meaning of words. * * * In our opinion this section [section 19, art. 11] requires no legislation to enforce it; and, further, that the provisions of the act of April 1, 1872, authorizing the superintendent of streets, etc., of the city and county of San Francisco to execute the contract under consideration, ceased to be operative on the 1st day of January 1880, as inconsistent with the section referred to."

In the case of *Donahue v. Graham,* 61 Cal. 276, the case of *Mc. Donald v. Patterson, supra,* was followed. In the case of *Oakland Paving Co. v. Hilton,* 69 Cal. 483, 11 Pac. 3, the court again adhered to the rule announced in the case of *McDonald v. Patterson, supra,* and said:

"The constitutional provision is prohibitory in its language, and when that is the case no legislation is required to execute such provision. It is then self-executing—operating *proprio vigore.* The Constitution, in regard to contracts for street work presents in itself a complete rule in the particular mentioned. It requires no legislation to make it more complete. Every constitutional provision is self-executing to this extent: That everything done in violation of it is void. *Brien v. Williamson,* 7 How, (Miss.) 14. The fifteenth amendment to the Federal Constitution provides that 'the right of citizens of the United States to vote shall not be abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.' This provision is self-executing to the extent that of its own force it abolishes all distinctions in suffrage based on the particulars mentioned (Cooley's Const. Lim. 133), whether these distinctions existed in a statute subsisting when the amendment went into operation, or whether the statute was subsequently enacted. The same may be said of the provision of the same Constitution that no state shall pass a law impairing the obligation of contracts (article 1, § 10, Const. U. S.) as of all the matters prohibited by section 10, art. 1, just cited. See *Ewing v. Oroville Mining Co.,* 56 Cal. 649. Nor is this section 19 limited to prohibiting the Legislature from passing laws authorizing contracts in the future in violation of its provisions. It does this, but it does more. It operates on all contracts for street work, whether entered into under laws existing when the section went into effect, or under statutes subsequently enacted. Whenever a case arises presenting a contract of the character indicated, it operates to declare such contract void and of no effect. See *County of Los Angeles v. Lamb,* 61 Cal. 198. In fact it is the solemn declaration of the paramount organic law operating on all departments of the government, expressed in the clearest and strongest language of prohibition. No act can be done by any department contrary to its provisions. It is a law absolutely controlling the legislative, executive, and judicial departments of the government. It takes effect on laws already passed, as well as to those to be enacted in the future. * * * By the express declaration of the first section of article 22 of the Constitution, all laws inconsistent with the Constitution ceased when that instrument began to operate. * * *"

Negative or prohibitory provisions in a Constitution require no legislation, as a rule, to carry the mere prohibition declared into effect. *American Union Tel. Co. v. Western Union Tel. Co.,* 67, Ala. 30, 42 Am. Rep. 90; *De Turk v. Commonwealth,* 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. Rep. 705; *State v. Woodward,* 89 Ind. 110, 46 Am. Rep. 160; *Law v. People,* 87 Ill. 385; *Washingtonian Home of Chicago v. City of Chi-*

cago, 157 Ill. 414, 41 N. E. 893, 27 L. R. A. 802; *Synod of Dakota v. South Dakota,* 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 421; *Householder v. Kansas City,* 83 Mo. 495; *Hickman v. Kansas City,* 120 Mo. 116, 25 S. W. 225, 23 L. R. A. 662, 41 Am. St. Rep. 684; *Ex parte Cain,* 20 Okla. 125, 93 Pac. 975.

The clause "no person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information," as said by Mr. Justice Brewer in *Whitman v. National Bank of Oxford, supra,* is not merely directory to the Legislature to make provision to that end, but of itself declares it. To this extent said provision of the Constitution is self-executing, and it also comes within the rule laid down by Mr. Cooley that a provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed or protected, or the duty imposed enforced. For by the common law, which is in force in this jurisdiction (Civ. Proc. c. 66, art. 1; Wilson's Rev. & Ann. St. 1903, § 4200), in aid of the general statutes of this state, informations, as employed in this section having a common law meaning (*Mayor of Mobile v. Stonewall Ins. Co.,* 53 Ala. 577; *Ex parte Roundtree,* 51 Ala. 44; *English v. State,* 31 Fla. 341, 12 South. 689; *State v. Barker,* 107 N. C. 917, 12 S. E. 115, 10 L. R. A. 50; *Favell's Case* R Watts & Serg. (Pa.) 198; Cooley's Const. Lim. (7th Ed.) p. 94), were exhibited by the Attorney General (*Evans v. Willis,* 22 Okla, 97 Pac. 1048), and with us the powers which in England were exercised by the Attorney general or Solicitor General are largely distributed among our county attorneys, whose office does not exist in England. The latter officers seem to be entitled, under the common law here in force, to prosecute by information. *State v. Kelm,* 79 Mo. 515; *Evans v. Willis, supra,* ; *State v. Houston,* 21 Okla. 782, 97 Pac. 995. In the latter case the court said:

"It is the duty of the county attorney, except as otherwise provided, to prosecute and defend all actions, both civil and criminal, in the district and county courts in which the state is a party or interested."

In the case of *State v. Kelm, supra,* the court said:

"Bishop (section 144) says: 'In our states the criminal information should be deemed to be such , and such only, as in England is presented by the Attorney or Solicitor General. This part of the English common law has plainly become common law with us. And as with us the powers which in England are exercised by the Attorney General, are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information as a right tdhering to their office, and without leave of court.' Wharton lays down the same doctrine. Crim. Pl. & Pr. (8th Ed.) § 87."

The case of *State v. Kelm* was cited with approval in the case of *Evans v. Willis, supra.*

In the case of *State v. Kyle,* 166 Mo. 295, 65 S. W. 764 (56 L. R. A. 115), the court said:

" 'By the law of England informations by the Attorney General without the intervention of a grand jury were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Black. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself.' *Ex parte Wilson,* 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; 1 Bishop's New Criminal Procedure, §§ 141, 142. And not until the amendment of section 12, art. 2, of the state Constitution, adopted at the general election held on November 8, 1900, by which it is provided that 'no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies,' could a person be prosecuted criminally in this state for felony otherwise than by indictment. * * *"

On page 303 the court further said:

"In the *Kelm Case* it was held that the term 'information,' as used in article 2, § 12, of the state Constitution of 1875 (Ann. St. 1906, p. 134), was to be understood in its common-law sense—that is, a criminal charge which at common law is presented by the Attorney General, or if that office is vacant, then by the Solicitor General of England, and in this state by the prosecuting attorneys of the respective counties who exercise the same powers as are exercised by the Attorney General or

Solicitor General of England—that is, the power to present informations under their official oaths."

In the case of *State v. Pohl,* 170 Mo. 428, 70 S. W. 695 the case of *State v. Kyle, supra,* was approved. In the case of *State v. Vinso,* 171 Mo. 587, 71 S. W. 1037, the court said:

"In *State v. Kyle,* 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, we held that 'information' as used in our Constitution, means the common-law information; and, in the absence of statutory provisions to the contrary, the common-law practice prevails, and we have seen amendments proper were allowed at common law as a matter of course at any time before trial. *State v. White,* 64 Vt. 372, 24 Atl. 250."

In the case of *State v. Bonner,* 178 Mo. 430, 77 S. W. 464, the court said:

"In *State v. Kyle,* 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, the court in banc held that the amendment took effect from the time of the canvass of the vote on the amendment by the Secretary of State, and it was self-enforcing and operative from the date it took effect, to wit, December 19, 1900. * * * So that, while there was no statutory method of procedure provided when the *Kyle Case* arose, and for that reason the common-law form of information was adjudged sufficient when this prosecution was commenced, there was a specific statutory provision governing this method of prosecution, and one which no one will question the right of the Legislature to prescribe. When our General Assembly took this subject in hand and directed the form of prosecutions by information, the common law on this subject no longer obtained. It was the obvious purpose of the Legislature, in view of the amendment to the Constitution, to revise the whole subject-matter of the prosecutions by information, and to make article 3, c. 16, Rev. St. 1899 (Ann. St. 1906, p. 1485), uniform in its operation as to all grades of crime, and it must be held that the acts of March 13, 1901, (Laws 1901, pp. 138, 139 [Ann. St. 1906, § 2476]), operated to supersede the common law on the subject, and that they were intended to prescribe the only rules of procedure which should govern such prosecutions,"

Again, the succeeding clause in said section, "no person shall be prosecuted for felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination," also appears to be mandatory, as well as prohibitory, and to declare a rule, and comes also not only within the rule declared by Mr. Justice Brewer in the case of *Whitman v. National Bank of Oxford, supra,* but within the purview of the foregoing doctrine announced by Mr. Cooley.

The question then arises, the said section, prohibitory in its character, being self-enforcing to that extent, and supplying the rule that a felony might be prosecuted by information, as employed by the common law in force in this jurisdiction and modified by statute, and the rule announced in said section further requiring, as a condition precedent to such prosecution by information, that the accused should first have a preliminary examination before an examining magistrate or waive the same, whether or not the statutes of the state furnish procedure and machinery for such purpose. We think so. Chapter 68, art. 5 (Cr. Proc.) Wilson's Rev. & Ann. St. 1903, §§ 5216-5303, affords, in comprehensive detail, all the machinery for preliminary examinations before examining magistrates: The accused must be present; a reasonable time and means for sending for, or for his procuring, counsel; the right of cross-examination of witnesses produced by the prosecution, and of producing witnesses in his behalf; the testimony of the witnesses, including the statement or evidence of the defendant in the event he elects to be sworn and testify or make a statement, all to be reduced to writing or reported by the magistrate or his clerk, and to be retained by such magistrate or clerk until the same is turned over to the proper court, not to be open to inspection by any person whatever, except the judge of the court having jurisdiction of the offense, the prosecuting attorney, and the defendant and his counsel; the accused to be held by the magistrate to answer the accusation if he finds that a public offense has been committed and there is sufficient cause to believe the accused guilty thereof. Hence we find that the section of the Constitution under consideration, prohibitory in its character, is at all events self-enforcing to the extent that prosecutions may be had for felonies by means of information. The rule supplied requires two conditions: The existence of statutes or law providing for the charging of the offense by information, and for preliminary examination of the accused before a magistrate. We find that all of these conditions are met by the laws now in force in the state.

But let us further consider said section 17 in the light of other sections of said article 2 (Bill of Rights) of the Constitution. Section 20 provides that the accused shall have the right to a speedy and public trial; shall be informed of the nature and cause of the accusation, and have a copy thereof, and in capital cases, at least two days before the case is called for trial, shall be furnished with a list of the witnesses, with their post-office addresses, that will be called in chief to prove the allegations of the indictment or information; section 19 that all prosecutions shall be carried on in the name and by the authority of the state of Oklahoma, and all indictments, informations, and complaints shall conclude "against the peace and dignity of the state;" section 18 that a grand jury shall be convened upon the order of a judge of a court having jurisdiction of felonies, upon his own motion, or such grand jury shall be ordered by such judge upon the filing of a petition therefor by 100 resident taxpayers of the county, with a proviso that the Legislature may make the calling of a grand jury compulsory. The foregoing are all mandatory and self-executing or self-enforcing in their nature, and evidently contemplate prosecutions of felonies by means of an information.

Reference might also be made to other provisions of like nature in said article: Section 22 providing that in all prosecutions for libel the same may be justified by proving the truth of the charge and good faith on the part of the accused; section 27 making it compulsory to give evidence, and providing for immunity; section 30 relating to the right of the people to be secure in their persons, houses, papers, and effects against all unreasonable searches and seizures, and restraining the issuance of warrants except upon probable cause supported by oath or affirmation, describing, as particularly as may be, the place to be searched and the person or thing to be siezed. These provisions may be considered together for the purpose of ascertaining the intent of the framers and those ratifying the Constitution. Practically all of said sections, under the rules herein referred to, are self-enforcing; and, when we consider the fact that it is within the discretion of the district judge to call a grand jury, unless the taxpayers, 100 in number, petition him therefor, in connection with the proviso that the Legislature may make it compulsory on him to do so, the strong presumption arises that it was the intention in framing this section that the expense incident to a grand jury and the investigations thereby might be obviated, except when within the discretion of the presiding judge it was necessary, unless the Legislature in its sovereign discretion might determine otherwise.

But it is suggested that section 5304, Wilson's Rev. & Ann. St. 1903, provides that no person shall be prosecuted for a felony in the district courts except by an indictment, and for that reason prosecutions for felonies by information are not permissible as long as said section stands. Section 2 of the schedule to the Constitution provides that "all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law." If said section 5304 is repugnant to section 17, art. 2, of the Constitution, it follows that the same was not extended to, and did not remain in force in the state after its admission into the Union.

The question might further arise, though it is not now necessary to be determied for the proper disposition of this case, as to whether or not section 5306 (Cr. Proc. c. 68, art. 6, § 170), Wilson's Rev. & Ann. St. 1903, which provides that: "The county attorney shall subscribe his name to informations filed in the probate or district court and indorse thereon the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may thereafter become known to him, at such time before the trial as the court may by rule prescribe. All informations shall be verified by the oath of the prosecuting attorney, complainant or some other person: Provided, that when an information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief"—was extended to and remains in force in this state until altered or repealed by law, by virtue of section 2 of the schedule to the Constitution. Such would be the case, unless it is repugnant to the provisions of section 20, art. 2, to the effect that the accused "shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information,together with their post-office addresses." If section 5306, *supra*, was repugnant to said section, it was not in force after the admisison of the state into the Union; otherwise it did remain in force, and the common law as to informations would be modified to the extent that said section 5306 may conflict therewith. Under the common law it was not necessary that an information should be verified by the Attorney General or Solicitor General *Evans v. Willis,* 22 Okla. 97 Pac. 1048; *State v. Pohl,* 170 Mo. 428, 70 S. W. 695. Said section 5306 does not seem, though we do not now pass thereon, to be repugnant to the provisions of said section 20, art. 2, but supplementary thereto; nor does it appear to have operated to supersede the common law other than to modify same in regard to informations. For said section does not cover the whole subject-matter of prosecutions by information as is provided for by section 17, art. 2, of the Constitution. Having reached the conclusion that said section 17, art. 2, is self-enforcing, at least to the extent that it immediately became effective as to the prohibition declared therein, which is to the effect that prosecutions for felonies shall be had by means of indictment or information, said section 5304, *supra,* is clearly repugnant thereto. *Campbell et al. v. State ex rel. Brett,* 99 Pac. 778, and *Arie v. State,* 100 Pac. 23, (recently decided by this court, but not yet officially reported); *McDonald v. Patterson, supra*; *Donahue v. Graham, supra*; *Oakland Paving Co. v. Hilton, supra*; *Cass v. Dillon,* 2 Ohio St. 608; *Ohio ex rel. Evans v. Dudley,* 1 Ohio St. 437; *Washington Home of Chicago v. City of Chicago, supra; Brien v. Williamson,* 7 How. (Miss.) 14.

There can be no question but that where it is provided in a state Constitution, in such a way that it is self-executing or made effectual by supplementary legislation, that a citizen may be tried for a felony by information, such citizen is not deprived of any rights under the federal Constitution. *Lybarger v. State,* 2 Wash. 555, 27 Pac. 449, 1029; *Hurtado v. California,* 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232; *Barron v. Mayor, etc., of Baltimore,* 7 Peters, 243, 8 L. Ed. 672; *Twitchell v. Pennsylvania,* 7 Wall. 321, 19 L. Ed. 223; *Fox v. Ohio,* 5 How. 432, 12 L. Ed. 213; *McNulty v. California,* 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882.

No question will be considered on this application to this court in this case other than that as to the construction of the provisions of section 17, art. 2, of the Constitution, and as to whether or not relator may be prosecuted in the district court of Kingfisher county for a felony by means of an information, and, being so prosecuted, whether or not he was deprived by the state of Oklahoma of any rights under the federal Constitution, such questions pertaining to the jurisdiction of the district court of Kingfisher county. *Ex parte Patman,* 20 Okla. 846, 95 Pac. 622, and other authorities cited in *Re McNaught, Post,* Part II. 99 Pac. 241.

Having determined all these questions against the relator, the writ of *habeas corpus* is hereby discharged, and the prisoner remanded to the custody of the sheriff of said county.

All the Justices concur.

Oklahoma Criminal Reports

Vol. 1, Part II.

OPINIONS OF THE CRIMINAL COURT OF APPEALS

THOMAS SLATER v. UNITED STATES.

No. 605, Ind. T. Opinion Filed October 16, 1908.

(98 Pac. 110.)

1. **APPEAL AND ERROR—Review of Evidence Unnecessary.** When an assignment of error, that the evidence does not support the verdict, is overruled, and the cause remanded upon errors of law, the court will not discuss the evidence.

2. **NEW TRIAL—Newly Discovered Evidence—Affidavits—Sufficiency.** In a motion for a new trial, upon the ground of newly discovered evidence, the affidavit of the defendant should set out the proposed evidence, and it must be such as could not have been secured at the former trial by reasonable diligence on the part of the defendant, and the diligence used must be stated in the affidavit. The affidavit of the witness should, if possible, accompany the motion.

3. **WITNESSES—Credibility—Conviction of Crime.** For the purpose of affecting the credibility of a witness he may be asked, on cross-examination, if he has been convicted of a felony or of any crime which involves a want of moral character; but it is improper to ask such witness if he has been indicted, arrested, or imprisoned, before conviction, for any offense whatever.

4. **INSTRUCTIONS—Possession of Stolen Property—Presumption.** It is error to instruct a jury that the possession of property recently stolen raises a presumption against the party having such possession, which requires an explanation from him; this being a charge upon the weight of the evidence.

5. **TRIAL—Conduct of Court—Intimation of Opinion.** It is improper for a trial judge, either directly or indirectly, to let the jury know, or even to intimate to them, what his opinion is as to the credibility of any witness testifying in a case before him.

(Syllabus by the Court.)

Appeal from the United States Court for the Central District of the Indian Territory; T. C. Humphrey, Trial Judge.

Thomas Slater was convicted, in the United States Court for the Central District of the Indian Territory, of larceny. An appeal was prosecuted to the United States Court of Appeals for the Indian Territory and transferred to the Supreme Court of Oklahoma under the enabling act (Act. June 16, 1906, c. 3335, 34 Stat. 267), and thereafter to the Criminal Court of Appeals. Reversed and remanded.

J. G. Ralls, for appellant.— On the question of whether, on cross-examination, a witness may be asked if he has been indicted or arrested: *Anderson v. State,* 34 Ark. 257; *Van Bokkelein v. Bardell,* 130 N. Y. 141. The presumption attaching to the possession of recently stolen property: *Denmark v. State,* 58 Ark. 576; *Shepard v. State,* 44 Ark. 39; *Boykin v. State,* 34 Ark. 443.

T. B. Latham and *W. C. Reeves,* Asst. Attorney General, for the United States. On the question of showing necessary to secure new trial on ground of newly discovered evidence; *Runnels v. State,* 28 Ark. 121; *Anderson v. State,* 41 Ark. 229; *White v. State,* 17 Ark. 404; *Bixby v. State,* 15 Ark. 398; *Hamlin v. State,* 48 Conn. 92; Whar. Cr. Pl. and Pr. Secs. 862, 866, 871. On the question of proper cross-examination in discrediting witness by asking if he had been charged with crime: *Hollingsworth v. State,* 53 Ark. 391; *Baker v. State,* 58 Ark. 523; *Oxier v. United States,* 1 Ind. Ter. Rep. 93; *Burdett v. Com.* 93 Ky. 76; *State v. Taylor,* 118 Mo. 153; *State v. Ezzell* and *Ivey,* 41 Tex. 35; Whar. Cr. Ev., Secs. 432, 473, 474, 567, 991; Gillett on Indirect and Col. Ev., sec. 91.

FURMAN, PRESIDING JUDGE. Appellant was convicted on the 28th day of January, 1905, in the United States Court for the Central District of the Indian Territory, upon an indictment charging him with the larceny of a horse, and his punishment was assessed at imprisonment in the United States penitentiary for the period of six years. An appeal was prosecuted to the United States Court of Appeals for the Indian Territory, and was pending in that court when the state of Oklahoma was admitted into the Union. Under the provisions of the enabling act (Act June 16th, 1906, c. 3335, 34 Stat. 267) and the Constitution of Oklahoma, this cause was then transferred to the Supreme Court of Oklahoma. Upon the creation of this court, the Supreme Court, as directed by statute, transferred this case to the Criminal Court of Appeals. The evidence for the prosecution is circumstantial.

First. Appellant assigns, as error, and complains of the action of the trial court in not sustaining his motion for a new trial, upon the ground that the testimony does not support the verdict against him. As this case will be remanded for a new trial on account of errors of law herein after pointed out, we do not care to discuss the testimony further than to state that we approve the action of the trial court upon this question.

Second. Appellant assigns, as error, and complains of the action of the trial court in not sustaining his motion for a new trial upon the ground of newly discovered evidence. Touching this matter, the motion for a new trial is as follows:

> "Since the trial of this action, the defendant has discovered material evidence to his defense that he did not know of prior to the trial. That since said trial he has discovered that one Sim Jamison and J. J. Sparks, who lives near Oconee, Choctaw Nation, Indian Territory, and who is over 60 years of age, will testify taht about 2 o'clock in the night that the horse was stolen a man came to Sparks' and Jamison's riding the horse, which was a white horse or an iron gray horse that would be called white, and not branded, and stated to said Jamison and Sparks that he was lost, and asked to stay with him the balance of the night. Jamison let him stay the balance of the night, and that the man left Jamison's camp shortly after daylight and started in the direction of Oconee. That the horse the man was riding was the horse that had been stolen from Birchfield, and that the defendant was not the man that had the horse and was not with him. That the man that was riding the horse was a stranger to Sparks and Jamison, but that Sparks and Jamison will testify that if they would see the man again they would know him. Defendant says that this is material and new evidence, and that he believes the same to be true, and that he is not guilty of the crime."

The record does not contain any affidavit from the proposed witness, Sim Jamison. It contains an affidavit from J. J. Sparks, which is substantially the same as that of the appellant.

In *Runnels v. State,* 28 Ark. 121, it is said:

"Applications for new trials on the ground of newly discovered evidence are to be rceeived with caution, and this in proportion to the magnitude of the offense. The application should be corroborated by the affidavits of other persons than the accused, and, if possible, those of the newly discovered witnesses themselves, and it is not sufficient for the applicant to the state that he did not know of the existence of the testimony in time to have brought it forward on the trial; but it must appear that he could 13 Ark. 362; Graham & Waterman, New Trials, vol. 1, pp. 462, 485, and cases cited."

In *Twine, Saddler & Sawner v. Alice Kilgore,* 3 Okla. 643 39 Pac. 389, Judge Burford said:

"An application for a new trial on the ground of newly discovered evidence must show that the appellant used diligence to procure and present the evidence upon the trial, and the facts showing due diligence must be shown, so that the court may determine whether the diligence used was sufficient. *Allen v. Bond,* 112 Ind. 523, 14 N. E. 492; *Hamm v. Romine,* 98 Ind. 77. There is no showing in the case at bar that the defendant used any diligence whatever to procure the testimony upon which their motion for a new trial is based, nor is there any allegation to the effect that they had no knowledge of such evidence prior to the trial of said cause."

In *Flersheim Mercantile Co. v. Gillespie,* 14 Okla. 143, 77 Pac. 183, Judge Irwin said:

"The next asignment of error is that the court erred in refusing to grant to plaintiff a new trial on the ground of newly discovered evidence. It is a well-recognized rule of this court that a new trial on the ground of newly discovered evidence will not be sustained, unless it affirmatively appears from the affidavit in support of such motion that diligence has been used to discover such testimony, and that the same could not have been discovered at a time prior to the trial by the use of reasonable diligence. In the affidavit in support of the motion for a new trial in this case, the general statement is made that the plaintiff and its attorneys have used every possible effort to ascertain the names of these witnesses, and the facts whereof they would testify; but it does not appear by the affidavit what these efforts were, or in what manner or how they investigated or made inquiry to ascertain the facts."

The above cases present our view of the law upon this question clearly and fully. In this case the affidavit is silent upon the question of diligence. It is therefore fatally defective, and the trial court did not err in refusing to grant a new trial upon this ground. An affidavit for a new trial upon the ground of newly discovered evidence must set out the proposed evidence, and it must be such as could not have been secured at the former trial by reasonable diligence on the part of the defendant, which fact should appear in the affidavit. If possible, it should be accompanied by the affidavit of the newly discovered witnesses.

Third. Appellant seeks to secure a reversal of the judgment in this case upon the ground that one of his witnesses, Tom Guinn, on cross-examination, was asked by the prosecution: "Have you ever been arrested?" To which the witness replied that he had. The prosecution then asked the witness what he had been arrested for. The witness replied that he had been arrested for stealing bois d'are posts, and also for disposing of mortgaged property. These questions were asked and answered over the objections and exceptions of counsel for appellant. Previous to being asked the above questions, the witness had stated that he had never been convicted of any crime.

Prior to statehood, the citizens of the United States living in what then was Indian Territory, had no form of government of their own outside of incorporated towns and cities. They were governed exclusively by the United States courts, under laws put in force in that country by acts of Congress. Chapter 46 of Mansfield's Digest of the Laws of Arkansas, entitled "Criminal Procedure," was put in force in Indian Territory by acts of Congress, both by Act May 2, 1890, c. 182, § 33, 26 Stat. 96, and by Act March 1, 1895, c. 145, § 4, 28 Stat. 695. By the former act the provisions of this chapter were qualified by the words, "as far as are applicable"; but, by the latter act named, there was no qualification or exception whatever. Under the head of "General Rules for the Examination of Witnesses" (Indian Territory Statutes [Ann. St. 1899, § 2017; Mansf. Dig. § 2902]), we find the following:

> "A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or immorality renders him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown, by the examination of a witness, or record of a judgment, that he has been convicted of felony."

When this provision of law was placed in force in Indian Territory, by act of Congress, it had repeatedly been construed by the Supreme Court of Arkansas, and had a clear and fixed meaning attached to it. The Supreme Court of Arkansas, in construing this statute, in the case of *Bates v. State,* 60 Ark. 451, 30 S. W. 890, says: "A witness cannot be impeached nor his testimony impaired by proving that he has been indicted for larceny"—and cites the following cases as showing that this is the settled rule in that state; *Holder v. State,* 58 Ark. 478, 25 S. W. 279; *Carr v. State,* 43 Ark. 99; *Anderson v. State,* 34 Ark. 257.

Section 2051 of the Code of Civil Procedure of California is as follows:

> "A witness may be impeached by the party against whom he was called by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony."

In construing this section, in *People v. Chin Hane,* the Supreme Court of that state, on pages 606 and 607, 108 Cal., 41 Pac. 700, says: "In order to impeach the credibility of awitness, including a defendant, when he testifies, the witness may be asked if he has ever been convicted of a felony. * * * Beyond this the examination should not go."

The Supreme Court of New York, in the case of *Van Bok-*

kelen v. Berdell, 130 N. Y. 141, 29 N. E. 254, says: "Whilst a witness may be discredited by showing his conviction for an offense, we do not understand it to be competent to discredit him by showing that he had been indicted."

In the case of *Glover v. United States,* 147 Fed. 429, 77 C. C. A. 453, 454, the court says:

> "* * * The prosecuting attorney inquired of several witnesses for the defense as to whether they had not been arrested at some time on some charge or other. Although the witnesses answered that they had been arrested for offenses, in instances they had not even been prosecuted, and where prosecuted they had been acquitted, the prosecuting attorney would follow this up, however, with a suggestive query: 'You have been arrested or accused several times?' It is competent for the purpose of discrediting a witness to show that he has been convicted of a crime. The general rule is that the crime must rise to the dignity of a felony or petit larceny. *State v. Taylor,* 98 Mo. 244, 11 S. W. 570; *State v. Kelsoe,* 76 Mo. 507; *State v. Donnelly,* 130 Mo. 651, 32 S. W. 1124; *Coble v. State,* 31 Ohio St. 100; *Glenn v Clore,* 42 Ind. 60. Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be admitted for the reason that innocent men are often arrested charged with a criminal offense. 1 Greenleaf on Evidence (16th Ed.) 461b, 461c, pp. 579, 580. The proper evidence of a conviction of a crime is the record thereof. See *Baltimore &Ohio Railroad Company v. Rambo,* 59 Fed. 75-80, 8 C. C. A. 6; *Bise v. United States,* (recently decided by this court) 144 Fed. 374, 74 C. C. A. 1. The practice of proving the former conviction by cross-examination is recognized in many states, usually by statute and occasionally by judicial decisions. 1 Greenleaf on Evidence (16th Ed.) par. 461b, note 8. But where this practice is recognized, the proper question would be as to whether or not the party being interrogated had been convicted of a crime, and not whether he had been arrested or indicted."

We might well rest our decision of this question upon the statute, and authorities above cited; but as counsel for appellee have, in their brief, discussed the general principles involved in this question, and as it is liable to be raised in the trial of many criminal cases, we deem it best to go into the matter fully, so that the trial courts of the state may know what rule of practice will be adhered to by this court, whether the cases are subject to the statute above quoted or not, and thus avoid the reversal of cases in the future upon this question. We have not overlooked, or failed to consider, the cases which announce a doctrine contrary to the views expressed in the authorities above cited. In our judgment these cases are not founded upon justice, or supported by reason. It would be a useless consumption of time to take these cases up and discuss them in detail. Precedents should be weighed, and not counted. We will now proceed to give what we believe to be the fundamental principles which should control the introduction of this class of evidence. The sole purpose of its admission is to effect the credibility of a witness.. There are many crimes the commission of which conclusively proves an utter want of moral character, such as seduction, arson, forgery, perjury, larceny, obtaining money or goods by false pretenses, and similar offenses. They all necessarily impute disgrace and infamy. If a witness has been convicted of any of this class of offenses, it should be known to the jury, so that they may properly weigh his testimony, as indicating a tendency to deceit and falsehood. As witnesses are often called whose past lives are unknown to the party against whom their evidence is offered, it is proper that, on cross-examination, a witness may be asked if he has ever been convicted of a felony, or of any other offense which indicates a want of moral character. This may be done solely for the purpose of affecting the credibility of his testimony. Where it is sought to disqualify the witness and exclude his testimony, the record evidence of his convictions must be presented, if obtainable. To this extent there is practically no conflict in the authorities. The line of divergence begins with those cases which go further, and hold that a witness may be asked if he has ever been indicted, arrested, or imprisoned for crime. To this doctrine we cannot give our assent. It is manifestly unjust to expect that a witness can be prepared, without notice, to disprove every accusation of his enemies or alleged act of his life. Even if he could and was permitted to do so, it would require the introduction of testimony relating to collateral matters, and thus needlessly occupy the time of the court, and confuse the real issues in the case in the minds of the jurymen. But these reasons do not apply to the query as to whether a witness has been convicted of a felony, because the witness well knows if this is true, and because the judgment is conclusive and cannot be attacked, and therefore the witness could not use supporting testimony to prove his innocence, even though he might have witnesses in the court for that purpose.

An indictment is nothing more than an accusation of a crime. An arrest is but the reassertion of this accusation. Imprisonment before conviction is only the result of such accusation. They all rest upon the same ground. Both by statutory provisions and by the general principles of the law, every person accused of crime is presumed to be innocent until his guilt is established in a court of competent jurisdiction, by legal evidence beyond a reasonable doubt. Accusations often rest upon hearsay and suspicion, and are frequently prompted by malice. To allow a witness to be asked if he has been indicted, arrested, or imprisoned for crime before conviction is to place hearsay, suspicion, and malice upon the same footing with, and to give them the same consideration, dignity, and conclusive character as is attached to, the solemn judgments of courts, rendered only after due notice and upon full, fair, and impartial investigation. To this we cannot agree; it matters not how many precedents may be cited to this effect. A multiplicity of errors does not make right that which is predicated upon false premises, and which was therefore wrong in its inception. To permit such questions to be asked is an act of cruel injustice to a witness. It is out of harmony with the philosophy of the law, and can serve no rightful purpose in the administration of justice.

But it is attempted to justify the admission of this class of evidence upon the ground that it is always permissible to inquire into the antecedents of a witness, by showing his occupation, social connections, manner of living, and such matters. While we approve the principles referred to, we deny its application to the class of evidence now under consideration. The presumption of law is that every person, to a large extent, has the right and power of selecting his occupation, social connections, and manner of living. Being matters largely of his own choice, they indicate his true character, and he is therefore responsible for them, and they may be inquired into for the purpose of affecting his credibility; but these reasons do not apply to indictments, arrests, or imprisonment before conviction, for the obvious reason that they are not matters of choice, but are involuntary, so far as the witness is concerned. When the reason for a rule of law ceases, the rule should fall with it. There is no rule of law that presumes guilt upon accusation, or on account of an arrest. Imprisonment before conviction is often evidence of poverty, rather than of criminality. A defendant of wealth can give bond, and, except in rare instances, does do so. The poor defendant is, in many cases, imprisoned, pending his trial. To say that such imprisonment raises a presumption of moral turpitude is illogical. It discriminates in favor of the rich and against the poor. It violates the fundamental principle of law that all classes, the rich and the poor, the influential and the humble, stand upon an equality before the courts.

For the reasons above given, we hold that upon cross-examination, for the purpose of affecting the credibility of the witness, he may be asked if he has been convicted of a felony, or of any crime which involves a want of moral character; but it is improper to ask such a witness if he has been indicted, arrested, or imprisoned, before conviction, for any offense whatever.

Fourth. Appellant assigns, as error, and complains of the following instruction given by the trial judge: "The possession of property recently stolen is a presumption against the party having possession, and it requires him to make explanation." Appellant duly execpted to the above instruction when it was given. The effect of this instruction is to inform the jury that the possession of property recently stolen raises a legal presumption of guilt against the party having it in his possession, and that the law requires an explanation from him of such possession. We do not so understand the law. In the case of *Oxier v. United States*, 1 Ind. T. 91, 38 S. W. 332, Judge Lewis says:

"The later and the sounder and better rule is believed to be that which makes the presumption arising from the possession of recently stolen property not a presumption of law, but of fact; in other words, an inference to be drawn or not, as the jury may determine in the light of all the evidence."

In the case of *Blair v. Territory*, 15 Okla. 550, 82 Pac. 653. Judge Buford says:

"While the possession of stolen property does not create a presumption of guilt, it is a circumstance which, if not satisfactorily explained, raises a very strong inference of guilt. This inference, together with the facts and circumstances attending the taking and connected with the possession, are questions for the jury, and may be sufficient to induce an irresistible conclusion of guilt. The circumstances of each particular case must be of necessity different, and while possession of stolen property in one case may not warrant a verdict of guilty, there are other cases where such possession is so related to other circumstances of a criminating character as to satisfy an unprejudiced mind that the possessor is the thief. Proof of possession alone is not sufficient to sustain the conviction; but where the larceny is proven beyond question, the stolen property found in the possession of the prisoner, and he exercising acts of ownership and control over and claiming it, and the explanation given by him is not a reasonable or satisfactory one, and the conduct and character of the prisoner are such as to arouse suspicion, such facts and circumstances often produce the most satisfactory evidence of guilt and will sustain a conviction."

We regard this statement by Judge Burford as an admirable exposition of the law upon this question, and deem a further citation of authorities unnecessary. We therefore hold that any presumption of guilt which may arise from the possession of property recently stolen is not a question of law, but is purely a question of fact, to be found by the jury upon a consideration of the entire evidence before them. The instruction complained of was upon the weight of the evidence, which is for the determination of the jury, and was therefore error.

Fifth. Appellant assigns, as error, and complains of the following instruction given by the trial court: "If a witness were to go on the stand and swear that the moon was made of green cheese, you would not be compelled to believe that statement." Appellant reserved an exception to this instruction when given. It is a fundamental principle of the law that the jurors are the judges of the credibility of the witness. During any stage of the trial of a criminal case, it is improper for the judge to let the jury know, or even intimate, what his opinion is as to the credibility of any evidence before them. He should not do this either directly or indirectly; it matters not how absurd and incredible the evidence may appear to him. In this case the appellant offered testimony for the purpose of explaining his possession of the stolen property. This evidence does not commend itself to our minds as being credible, and in all probability it was viewed in the same light by the trial judge. The instruction given was calculated to create the impression upon the minds of the jurors that the court regarded the testimony of the defense as being as incredible as the supposed testimony, "that the moon was made of green cheese." In this there was error.

Reversed and Remanded.

BAKER and DOYLE, JUDGES, concur.

Ex parte B. M. JOHNSON.

No. A. 20. Opinion Filed October 16, 1908.

(97 Pac. 1023.)

1. **TRIAL—Variance—Discharge of Jury—New Indictment.** Where, upon the trial of a case, it appears to the court that there is a variance between the allegations of the indictment or information and the testimony introduced, and the jury is discharged upon this ground, and it is the opinion of the court that a new indictment or information can be framed upon which the defendant can be legally convicted, it is the duty of the court to commit the defendant to custody, or to admit him to bail until such new indictment or information can be presented against him.

2. **HABEAS CORPUS—Grounds—Former Jeopardy.** The writ of **habeas corpus** cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy.

(Syllabus by the Court.)

Application of B. M. Johnson for writ of *habeas corpus.* Writ denied.

F. S. Winn, for petitioner.—

On the question of former jeopardy: *Bell v. State,* 44 Ala. 393; *Scott v. State,* 110 Ala. 48; *People v. Cades,* 48 Cal. 323; *Morgan v. State,* 13 Ind. 215; *Boswell v. State,* 111 Ind. 47; *In re McClosky,* 2 Okla. 577; *Williams v. State,* 42 Ark. 35; *Lee v. State,* 26 Ark. 260; *People v. Taylor,* 117 Mich. 583; *Mixon v. State,* 55 Ala. 129.

On the question of whether *habeas corpus* is the proper remedy: *Neilson, petitioner,* 131 U. S. 176; *In re Snow,* 120 U. S. 274; *People v. Stevens,* 79 Cal. 428; 31 Kan. 511.

Charles R. Bostick and *W. C. Reeves,* Assistant Attorney General, for respondent:—

On the question of the court's power to issue order of commitment: Wilson's Rev. & Ann. St. 1903, § 5508. *Habeas corpus* cannot be resorted to for the purpose of discharging defendant on ground of former jeopardy: *Miller v. Case,* (Kan. App.) 51 Pac. 922; *In re Terrell* (Kan.) 49 Pac. 158, *State v. Klock,* (La.) 12 South. 307; *Pitner v. State,* 44 Tex. 578; *Ex parte Crofford,* (Tex. Court Crim. App.) 47 S. W. 533; *In re Barton,* (Utah) 21 Pac. 998; *Steiner v. Nerton,* (Wash.) 32 Pac. 1063.

FURMAN, PRESIDING JUDGE. On the 6th day of October, 1908, petitioner, B. M. Johnson, was placed upon trial in the district court of Noble county, Okla., upon an information filed against him by the county attorney of said county, wherein the said B. M. Johnson was charged with the offense of obtaining money under false pretenses. The defendant entered a plea of not guilty. A jury was impaneled and sworn, and the state proceeded to introduce its evidence; but, before the state had concluded its evidence in chief, the county attorney moved to dismiss the cause, and requested that the defendant be held to answer to the charge of obtaining the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud him, the said E. J. Miller. Thereupon the court ordered that said cause be dismissed, and that the said defendant, B. M. Johnson, be remanded into the custody of the sheriff of Noble county, Okla.; and the county attorney was ordered to file, in the county court of Noble county, a complaint against the said B. M. Johnson for the said charge of obtaining the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud the said E. J. Miller, and that said defendant be proceeded against as directed by law. To all of which rulings and orders the defendant duly excepted.

On the 8th day of October, 1908, the defendant applied to this court for a writ of *habeas corpus,* alleging that the order of the trial court committing him to the custody of the sheriff of Noble county, pending the filing of a complaint against him, was without authority of law, and that he was entitled to his liberty. In order that this question might be decided and set at rest the writ was issued as prayed for. The presence of the defendant and of the sheriff of Noble county in this court was waived by stipulation of counsel on both sides and the matter was set for hearing on the 13th instant.

In his answer to the writ of *habeas corpus* the sheriff set up the matters hereinbefore stated, and further stated that on the 9th day of October, 1908, complaint was filed before the county judge of Noble county, in which the defendant was charged with having obtained the signature of E. J. Miller to a written instrument designedly and by false representations, with intent to cheat and defraud the said E. J. Miller, and that on said date commitment was issued out of said county court of Noble county commanding said sheriff to hold the defendant upon said charge, to await the further action of the court; that in the 10th day of October the defendant appeared before said judge, and entered his plea of not guilty, and that the bail of said defendant was fixed by said judge in the sum of $500, in default of which the defendant was committed to the custody of said sheriff. It further appears that by agreement of counsel said cause before said judge was set for preliminary hearing on the 15th day of

October, 1908, and that the defendant is now in the custody of the sheriff of Noble county awaiting said trial.

It is contended, by counsel for the defendant, that the proceedings, which are now pending before said county judge of Noble county, are for one and the same offense as that upon which he was previously placed upon trial in the district court of said county, and that this court should order his release upon the ground of former jeopardy. This presents two questions for determination, viz.: First. Did the district court of Noble county have the power to make the order committing defendant to custody, pending the filing of a new complaint against him? Second. Can the question of former jeopardy be considered upon a hearing on *habeas corpus?* We will now consider these questions in order named.

First. Section 5508 of Wilson's Revised & Annotated Statutes of Oklahoma of 1903 is as follows:

> "If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail that the bail be exonerated, or if he have deposited money instead of bail, that the money deposited be refunded to him, unless in its opinion a new indictment can be framed, upon which the defendant can be legally convicted, in which case it may direct that the case be resubmitted to the same or another grand jury."

From this it is clear that the trial court had the power to direct that the case be resubmitted to the same or another grand jury. The grant of power to do a certain thing necessarily carries with it the power to do all things which are necessary to the full accomplishment of the purpose had in view in granting the original power. To say that the court can direct a resubmission of a case to a subsequent grand jury, but is without power to hold the defendant in custody, or on bail, to answer an indictment which may be found, is to so construe the law as to result in its defeat, and thus render it absurd and abortive. It is a familiar principle of law that a statute must never be so construed as to defeat the plain purpose which it has in view. We, therefore, hold that it was the duty of the court to direct that the defendant should be held until another prosecution could be instituted. If the defendant requests bail pending the institution of the new prosecution, the court should fix the amount to be given. The evident purpose of section 5508, Wilson's Rev. & Ann. St. Okla. 1903, was that in the cases therein provided for the defendant might be held until he could be legally proceeded against. To construe this section otherwise would be to place form above substance.

Second. Can the plea of former jeopardy be heard on *habeas corpus* proceedings? It is an elementary principle of law, of universal acceptance, that mere errors or irregularities,which do not render the proceedings void, are not ground for relief by *habeas corpus.* We have an authority directly in point to the question now under consideration in the case of *In re Belt,* 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88. The petition for the writ set up former jeopardy as the ground upon which the petitioner sought to be released from custody. The Supreme Court says: "The general rule is that the writ of *habeas corpus* will not issue unless the court under whose warrant the petitioner is held is without jurisdiction, and that it cannot be used to correct errors." It then held that the lower court had jurisdiction, and the writ was denied. In *Whitten v. Tomlinson,* 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406, the writ was sought also upon the ground of former jeopardy. Referring to this plea, the court said: "Whatever effect it might have if pleaded to a subsequent indictment affords no ground for his discharge on *habeas corpus.*" In the case of *Ex parte Crofford,* 39 Tex. Cr. R. 547, 47 S. W. 533, the court says: "The decisions have been uniform that the writ of *habeas corpus* cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy."

We could cite authority without limit to sustain the proposition that a petitioner cannot be discharged on *habeas corpus* upon the plea of former jeopardy, but do not deem it necessary to do so. The district court of Noble county had jurisdiction of the offense charged and of the prisoner. It has jurisdiction to hear and decide upon the defenses offered by him. As to whether the defense now relied upon is good involves questions both of law and of fact. The trial court should pass upon the questions of law. A jury, under the instructions of the trial court, should pass upon the questions of fact involved. As the identity of the two alleged offenses is in question, this must go to the jury.

The relief prayed for cannot be granted.

BAKER and DOYLE, JUDGES, concur.

DAN PRICE *et al.* v. UNITED STATES.

No. 594. Ind. T. Opinion Filed October 16, 1908.

(97 Pac. 1056.)

1. **EVIDENCE—Threats—Purpose of Reception—Instructions.** It is error for a court to charge the jury in a murder case that proof of threats on the part of the deceased are admissible for the purpose of showing whether or not the deceased was the aggressor or the defendant was more likely to be the aggressor, and that evidence of threats is permitted for that purpose, and that alone.
2. **TRIAL—Murder—Manslaughter—Instructions.** It is error for the court to charge the jury in a murder case, "You may find the defendant guilty of manslaughter, in which case the court assesses the punishment; the court having it within his power to sentence the accused to confinement in the penitentiary for any length of time not exceeding ten years."
3. **WITNESSES—Impeachment—Cross-Examination.** For the purpose of impairing the credibility of a witness, he may be asked, on cross-examination, if he has been convicted of a felony, or any crime involving a want of moral character; but it is improper to ask the witness if he has been indicted, arrested, or imprisoned, before the conviction of said witness, for any offense whatever.
4. **WITNESSES—Failure to Obey Order of Exclusion.** A witness who violates the rule of the court, separating the witnesses and excluding them from the courtroom during the trial, by remaining in the courtroom during the most of the time of the trial, is not thereby rendered incompetent as a witness. Such violation can only affect his credibility as a witness, or subject him to punishment for contempt of court.

(Syllabus by the Court.)

Appeal from United States Court for the Northern District of the Indian Territory; Joseph A. Gill, Judge.

Dan and Ed Price were, on the 20th day of January, A. D. 1903, in the United States Court, for the Northern District of the

Indian Territory, indicted for the crime of murder, and jointly tried in said court, and by a jury, on the 5th day of October, A. D. 1904, found guilty of the crime of manslaughter, and on the 22d day of October, A. D. 1905, by said court sentenced to imprisonment in the United States penitentiary at Fort Leavenworth, Kan., for the period of three years, and that each pay a fine of $100 and costs. Reversed.

William P. Thompson and *Preston S. Davis,* for appellants On the question of improper charge relative to threats by deceased: *Monroe v. State,* 5 Ga. 85; *Brown v. State,* 55 Ark. 593; *State v. Dodson,* 4 Or. 65; *Garner v. State,* 28 Fla. 113; *State v. Alexander,* 66 Mo. 148; *Sparks v. Com.,* 89 Ky. 644; Rice on Evidence, vol. 3 (criminal) 1893. secs. 362 to 370; *Powell v. State,,* 53 Ala. 1; *State v. Evans,* 33 W. Va. 417; *Wood v. State,* 92 Ind. 269; *White v. State,* 30 Tex. App. 652; *Palmore v. State,* 29 Ark. 262. On the question of improper charge as to court's power to assess punishment: *Parmentr v. U. S.,* 98 S. W. 340 (U. S. Ct. Ap. for I. T.); *Stancliffe v. U. S.,* 5 Ind. Ter. Rep. 495; *Taylor v. U. S.,* 98 S. W. Rep. 123 (U. S. Ct. Ap. I. T.); Mansfield's Digest, sec. 2283.

W. C. Reeves, Assistant Attorney General, for appellee.

BAKER, JUDGE. An appeal was duly prosecuted in the United States Court of Appeals for the Indian Territory, and this case was pending in that court when the state of Oklahoma was admitted into the Union. Under the provisions of the enabling act and the Constitution of the state of Oklahoma, this case was duly transferred to the Supreme Court of Oklahoma. Upon the creation of this court the Supreme Court duly transferred the case to this court.

Before deciding this case the court desires to call the attention of counsel in this case to the fact that in the brief of appellants many references are made to the record without giving the court the benefit of the page of the record referred to. This necessarily entailed a great deal of additional work, which could easily have been avoided had counsel exercised more care in the preparation of their brief. We sincerely hope that counsel, in cases in this court, will aid us in the examination of records in the cases before it by stating in each instance the page of the record to which they desire to call the court's attention.

In this case the Attorney General filed the following confession of error: "Comes now the Attorney General of the state of Oklahoma, and states to the court that in his opinion the trial court in the above-entitled cause committed reversible error in giving the instructions complained of in assignments of error numbered 42 and 43"—which charges are as follows:

"Gentlemen, proof of threats on the part of the deceased are admissible to you for the purpose of showing whether or not the deceased was the aggressor or the defendants were more likely to be the aggressors. The evidence is permitted for that purpose, and that alone." "Third, you may find the defendants, or either or both of them, guilty of manslaughter, in which case the court assesses the punishment, which would be not to exceed 10 years."

The Attorney General was right in confessing error in connection with said assignments, for the reason that the court below did err in this charge, referred to in said assignments numbered 42 and 43, and that, by reason of said confessed error, this case must be remanded for new trial; but, notwithstanding said confessed error, there are a number of other meritorious assignments of error that, in the opinion of this court, should be passed upon at this time, believing that the ends of justice will best be subserved thereby.

The first assignment of error herein relates to the charge of the court, and is disposed of by the confession of error.

The court finds error in the second assignment. The verdict is contrary to law.

There is no error in the third assignment, for there is evidence to sustain the verdict.

This court is of the opinion that the court below erred in not sustaining the challenge of appellants to the entire panel of the petit jury; but, inasmuch as by the terms of the enabling act passed by Congress, putting into force the jury system of the territory of Oklahoma over the entire state, this question cannot come up in future trials in this state, and for that reason no further attention to this assignment of error is deemed necessary. This applies also to assignments of error numbered 7 and 8.

In the ninth assignment of error appellants complain of the rulings of the court below, wherein the court admitted certain testimony offered by the government, over the objection of appellants and refusing to allow appellants to introduce certain testimony offered by them, and to which rulings of the court appellants duly excepted. All of these exceptions are directed either to the direct testimony or the cross-examination of the following named Witnesses: J. E. Patterson, Mrs. Sophia Patterson, John Partain, Sam Price, W. R. Thompson, Robert Williams, F. M. Davis, F. Downs, Mrs. F. A. Downs, J. A. Patterson, Roe Cunningham, Della Vanbibber, Ed. Price, J. M. Crump, and James Walker. After carefully reading the testimony of all the witnesses above named, this court fails to find prejudicial error in the rulings of the trial court respecting the same.

Objection and exception having been made by the appellants to the testimony of Dr. W. A. Day, as shown by page 231 of the printed record, and feeling that this case will perhaps be tried again in the court below, and that this testimony may have an important bearing in such trial, we, at this time, give our views regarding admissibility of such testimony. Dr. Day is asked this question: "Did he [referring to the deceased] make the statement to you, or in your presence, concerning the facts of the killing, how it occurred?" To this question appellants made the following objection:

> "The appellants object to the question, for the reason the deceased would not be a competent witness under oath to appear and testify before a court of justice; that any statement he might have made, whether under oath or otherwise, would not be admissible, for the further reason that under our law a man having been convicted of the crime of larceny, is not a competent witness before a court of justice."

And while this question was not answered by the witness or passed upon by the trial court, this court assumes, from the testimony of the witness Day contained in the record, that it was for whose murder the appellants were tried. It is clear from the record that the objection was made on the ground of the incompetency of the testimony, by reason of the conviction of Qualls on a charge of larceny. At the time of the trial of this case in the court below sections 2859 and 2902 of Mansfield's Digest of the laws of the state of Arkansas, were in force in the Indian Territory. The first, relating to incompetency of witnesses, reads as follows: "The following persons shall be incompetent to testify: Persons convicted of a capital offense, or perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery or counterfeiting, except by consent of parties"—the second, relating to the impeachment of witnesses, reading as follows: "A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing he has made statements different from his present testimony, or by evidence that his general reputation for truth and immorality renders him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or record of a judgment that he has been convicted of a felony." In view of the statutes just quoted, if the objection to the testimony of Dr. Day was based upon the first statute—that is to say, that Qualls was incompetent by reason of his conviction for larceny (and from the statement of counsel in objecting to the question above referred to, that was the ground)—the record should show (in the absence of the consent of the parties to such testimony) a judgment of conviction or an exemplified copy thereof, if obtainable. In the absence of such proof of conviction the testimony of Tom Qualls would be competent, and his dying declaration (if otherwise admissible) would likewise be competent, and it would be the duty of the jury to consider such conviction in connection with his testimony (or his dying declaration) in determining the weight, if any, to be given to his testimony, notwithstanding his conviction. This rule of law is sustained in the case of *Bise v. United States,* 144 Fed. 374, 74 C. C. A. I, an Indian Territory case decided by Judge Vandeventer, of the Eighth United States Circuit Court of Appeals.

It will be observed by reading the case just cited that the defendant on the trial objected to the testimony of a witness, for the reason that the witness had been convicted of a felony. The trial court inquired whether the objection was for the purpose of impeaching or disqualification. Upon receiving an answer that it was for the purpose of disqualification, the court held: "In the absence of a controlling statute on the subject, the incompetency of the witness by reason of his prior conviction of a felony cannot be shown upon his examination, but only by the production of the record, or an exemplified copy of it"—the court in said case citing 1 Greenleaf on Evidence (14th Ed.) §§375-457, 2 Wigmore on Evidence, § 1270, and many other authorities; and cites 50 Cent. Dig. §§ 1161, 1162, for cases in point. The case of *Vance v. State,* 70 Ark. 277, 68 S. W. 37, is particularly instructive on this point, because both of the statutes above quoted are referred to in said case, and shows their distinction, and clearly defines the meaning and use of each, citing *Southern Ins. Co. v. White,* 58 Ark. 277, 24 S. W. 425; *Scott v. State,* 49 Ark. 156, 4 S. W. 750; *Holder v. State,* 58 Ark. 473, 25 S. W. 279; *Carr v. State,* 43 Ark. 99, and *Anderson v. State,* 34 Ark. 257. This question was also fully discussed and decided by this court in the case of *Thomas Slater v United States, ante,* p—. and will be followed by this court hereafter.

This brings us to the testimony of J. E. Cox, page 243 of the printed record. The record shows that the witness Cox was called by appellants and sworn as a witness. The prosecution objected to his testifying, for the reason that he had been in the court-room throughout the entire trial of this case, notwithstanding the court, at the commencement of the trial, enforced the rule excluding the witness from the courtroom during the trial. The court below erred in sustaining the objection to the the testimony of Cox. The fact that he was in the courtroom during the trial, not having been subpoenaed as a witness, and not knowing that he was going to be called as a witness, did not render him incompetent as a witness. If Cox had been subpœnaed as a witness in this case before the trial, or knew, at the commencement of the trial, that he was to be called as a witness, and, in violation of the rule of exclusion, remained in the courtroom during the trial, in the opinion of the court he would not have been disqualified as a witness. His remaining in the courtroom in violation of said rule might, however, be used in discrediting him as a witness, and subject him to a reprimand by the court and punishment for contempt, but it would not render him incompetent as a witness. The jury had a right to hear this evidence and pass upon its weight and credibility.

Coming now to the consideration of the testimony of David Price, father of appellants, shown on page 235 of the printed record, where said witness was asked by appellants: "Q. After the arrest and trial and conviction of Tom Qualls, were there any statements or threats against you or your boys communicated to you as having been made by Tom Qualls? A. Yes, sir." Mr. Turner, for the prosecution, said: "If the court please, this witness answered the question about the threats before I had an opportunity to interpose my objection. I desire the court to instruct the jury that they are not to consider that answer." The court:

> "Gentlemen of the jury, in reference to the threats, there have been no threats shown in this case, and before you can show them to have been communicated, they must be shown to have been made, and there are no threats shown to have been made in this case in any way, shape, or form, and this man's testimony that they were communicated is not evidence at all, and should not be considered by you for any purpose."

To this ruling of the court appellant duly excepted. Counsel for appellants should have placed in the record the words, or substance of the words, which constituted threats which they offered to prove. But, as this case will be remanded for a new trial, and as this question will doubtless come up again upon such trial, we deem it best to give our views with reference to the matter of threats. Taking the ruling of the court on this question in consideration with the charge to the jury in this case upon the subject of threats, we apprehend that the court below held that threats, made on the part of the deceased, Tom Qualls, were admissible for but one purpose alone. Quoting from the court's charge to the jury in this case: "Proof of threats on the part of the deceased are admissible to you for the purpose of showing to you whether or not the deceased was the aggressor or the defendants were more likely to be the aggressor. The evidence is permitted for that purpose, and that alone." Threats made by the deceased against the accused are admissible, upon the trial of the accused for the killing of the deceased: To show that the deceased manifested an angry and revengeful spirit towards the prisoner, and a determination to do violence to his person; to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred; to show a mitigation of the offense charged; to show the condition of the mind of the deceased, and the condition of mind of the defendant at the time of the homicide; to show the purpose and motives of the deceased in making the attack; to show whether or not the killing was done in self-defense; to show reasonableness of the fears of the defendant at the time of the homicide that he was in danger of losing his life, or of receiving great bodily harm, at the hands of the deceased; to show who was the aggressor; and, as part of the *res gestae*, where they tend to excuse or palliate the conduct of the accused; and to establish the state of feeling entertained by the deceased towards the accused. Uncommunicated threats are evidence of the mental attitude toward the prisoner. Communicated threats shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred. Both are clearly admissible. *Dunn v. State,* 2 Ark. 229, 35 Am. Dec. 54; *Harris v. Same,* 34 Ark. 469; *Brown v. Same,* 55 Ark. 593, 18 S. W. 1051; *State v Evans,* 33 W. Va. 417, 10 S. E. 792; *Wood v. State,* 92 Ind. 269; *White v. Same,* 30 Tex. App. 652, 18 S. W. 462; *Howell v. Same,* 5 Ga. 48; *Howard v. Same,* 23 Tex. App. 265, 5 S. W. 231; *Alexander v. Same,* 25 Tex. App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; *Garner v. Same,* 28 Fla.

113, 9 South. 835, 29 Am. St. Rep. 232; *Sparks v. Commonwealth,* 89 Ky. 644, 20 S. W. 167; *Hart v. Same,* 85 Ky. 77, 2 S. W. 673; 7 Am. St. Rep. 576; *Stokes v. People,* 53 N. Y. 174, 13 Am. Rep. 492; *State v. Sloan,* 47 Mo. 604; 3 Rice on Evidence (Criminal) Ed. 1893, §§ 362-370; *Logan v. State,* 17 Tex. App. 50. The court erred in taking this testimony from the jury, and not allowing the witness to testify to such threats.

For the various errors pointed out this case is reversed and remanded.

FURMAN, Presiding Judge, and DOYLE, Judge, concur.

Ex parte E. S. McClellan.

No. A. 18. Opinion Filed October 24, 1908.

(97 Pac. 1019.)

1. **BAIL—Habeas Corpus—Presumption of Guilt.** For the purpose of an application to reduce bail after information filed, the court must assume that defendant is guilty of the offenses charged.
2. **SAME—Reduction of Bail.** The Criminal Court of Appeals will not grant a reduction of bail on habeas corpus, unless it clearly appears that the amount fixed by the trial court is excessive, and clearly disproportionate to the offense involved.

(Syllabus by the Court.)

In the matter of the application of E. S. McClellan for writ of *habeas corpus.* Writ denied.

This is a proceeding in this court for a writ of *habeas corpus.* The petition was filed, and a writ of *habeas corpus* was properly issued on said petition the 6th day of October, 1908, and made returnable on the 13th day of the same month, service of said writ being acknowledged and accepted by respondent R. M. Connell, sheriff of Choctaw county, Okla. The petition alleges that said petitioner is unlawfully imprisoned at Hugo, Choctaw county, by R M. Connell, sheriff of said county; that petitioner has been charged with illegally selling whiskey; that his bail is fixed at the excessive and unreasonable amount of $1,000 each in four cases; that he has applied to the Hon. W. T. Glenn, county judge of said county, for writ of *habeas corpus* that said bail be reduced; and that said application was by said judge denied; that he is a poor man, and unable to make bond in the excessive amount fixed by the county court, and that by reason thereof he is denied his constitutional rights.

It appears from the return that there is an agreed statement of facts, as follows:

AGREED STATEMENT OF FACTS.

"It is hereby agreed that the personal attendance of the petitioner herein, E. S. McClellan, before the Criminal Court of Appeals on the hearing on petition for writ of *habeas corpus*, is waived. The personal attendance and appearance of the sheriff of Choctaw county, Okla., R. M. Connell, is also waived. It is agreed that the petitioner herein is held by R. M. Connell, sheriff of Choctaw county, Okla., by virtue of commitments issued to him out of the county court of said county, which commitments are regular on their face, commanding that said sheriff hold the said petitioner in default of bail in the following cases:

"No. 94. Keeping bawdyhouse, bond $1,000.

"No. 182. Unlawfully having in possession intoxicating liquor, bond $500.

"No. 183. Selling intoxicating liquor, bond $500.

"No. 186. Selling intoxicating liquor, bond $500.

'No. 206. Selling intoxicating liquor, bond $500.

"No. 264 Assault and battery, bond $50.

"No. 278. Resisting arrest, bond $1,000.

"No. 290. Carrying a pistol, bond $250.

"Witness our hands this 10th day of October, 1908.

"R. M. Connell, Sheriff Choctaw County.

"J. M. Willis, Co. Atty., Choctaw County.

"F. M. Brook, Attorney for Petitioner."

F. M. Brook, for petitioner.

Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for respondent.

DOYLE, JUDGE. (after stating the facts as above). The petitioner, E. S. McClellan, asks the court to admit him to bail upon four informations now pending against him in the county court of Choctaw county, wherein he is charged with illegally selling whiskey, on the claim that the bail as fixed by said county court was excessive, and was in contravention of his rights under the Bill of Rights of the state of Oklahoma. The return and agreed statement of facts, which is made a part thereof, show that the petitioner is held on eight commitments, isued on informations filed in said county court, charging various and divers offenses. It further shows that the amount of bail now fixed by said court, where the offense charged is selling intoxicating liquor, is fixed in the amount of $500 in each case. It is evident that the bail so fixed is not excessive, but is very reasonable.

The Bill of Rights in this state provides:

"Sec. 8. All persons shall be bailable by sufficient sureties, except for capital offense, where the proof of guilt is evident or the presumption thereof is great.

"Sec. 9. Excessive bail shall not be required."

Bail is not to be deemed excessive simply because the particular person charged cannot give the bail required, but bail should never be exacted for the purpose of punishing a person charged with crime, for no person is punishable for an offense, except upon a plea of guilty, or upon a conviction by a jury of his peers. Bail is exacted for the purpose of securing the attendance of the defendant at court at all times when his presence may be lawfully required, and his rendering himself in execution in any judgment that may be pronounced against him. Upon the application to admit to bail after information is filed the court must assume that the defendant is guilty of the offense with which he is charged. In an application to this court upon *habeas corpus* for a reduction of bail, upon the ground that the amount fixed by the trial court is excessive, it is not sufficient that this court might originally have deemed a lesser amount sufficient. In our opinion it must clearly appear that the trial court has abused its discretion to an extent that denies the defendant his constitutional rights before this court will reduce the amount of bail as fixed by the trial court. It is the uniform rule that appellate courts will not interfere with the action of trial courts unless "the bail demanded be *per se* unreasonably great, and clearly disproportionate to the offense involved." *Ex parte Duncan,* 54 Cal. 75.

In the foregoing case it was distinctly laid down that it must be assumed that the defendant was guilty of each of the 10 distinct offenses charged against him. *Ex parte Duncan,* 53 Cal. 410. And upon a second application, after two trials had been had without a conviction, it was held that this presumption still prevailed, as was said in *Ex parte Duncan, supra*:

"We are not to assume in this case the functions of the court committing the prisoner, or substitute our own for its judgment in fixing the amount of bail. Before we are authorized to interfere the bail demanded must be *per se* unreasonably great, and clearly disproportionate to the offense involved."

After a careful consideration of the matters presented it is our opinion that this court is not warranted in interfering with the matter of bail as fixed by the county court of Choctaw county.

The relator is remanded to the custody of the respondent. Writ of *habeas corpus* is denied.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

Ex parte ED HOUGHTON.

No. A. 19. Opinion Filed October 24, 1908.

(97 Pac. 1021.)

1. **BAIL—Amount—Purpose.** In fixing the amount of bail, the sole purpose which should guide the court or judge should be to cause the appearance of the accused to answer the charge against him.
2. **SAME—Presumption of Guilt.** For the purpose of an application to reduce bail, after information filed the court must assume that defendant is guilty of the offense charged.
3. **SAME—Excessive Bail—Reduction.** The Criminal Court of Appeals will not grant reduction of bail on habeas corpus, unless it clearly appears that the amount fixed by the trial court is excessive and clearly disproportionate to the offense involved.
4. **SAME—Case.** Where five informations were filed against petitioner, each charging him with illegal sale of intoxicating liquor, an order admitting petitioner to bail in the sum of $500 on each charge was not excessive; but an order fixing bail in the sum of $1,000 each, on three subsequent charges for the same offense, is excessive. When the trial court fixed the bail upon each of the first five charges at $500, it necessarily determined that such sum was sufficient to secure

the attendance of petitioner to answer the subsequent charges. (Syllabus by the Court.)

Application of Ed. Houghton for writ of *habeas corpus.* Writ denied.

This is an original proceeding in this court for a writ of *habeas corpus.* The petition was filed, and the writ of *habeas corpus* was properly issued on said petition, on the 6th day of October, 1908, and made returnable on the 13th day of October, 1908, service of said writ being acknowledged, and accepted by the sheriff of Choctaw county; and the said sheriff made return, which is set forth in an agreed statement of facts, which is as follows:

AGREED STATEMENT OF FACTS.

"It is hereby agreed that the personal attendance of the petitioner herein, Ed Houghton, before the Criminal Court of Appeals on the hearing on petition for writ of *habeas corpus* herein, is waived. The personal attendance and appearance of the sheriff of Choctaw county, Okla., R. M. Connell, is also waived. It is agreed that the petitioner herein is held by R. M. Connell, sheriff of Choctaw county. Okla., by virtue of commitments issued to him out of the county court of said county, which commitments are regular on their face, commanding that said sheriff hold the said petitioner in default of bail, in the following cases:

"No. 185.	Selling whiskey, bail,	$ 500
"No. 189.	Selling whiskey, bail,	500
"No. 193.	Selling whiskey, bail,	500
"No. 194.	Selling whiskey, bail,	500
"No. 265.	Selling whiskey, bail	500
"No. 266.	Selling whiskey, bail,	1,000
"No. 268.	Selling whiskey, bail	1,000
"No. 275.	Selling whiskey, bail,	1,000
"No. 279.	Resisting arrest, bail,	500
"No. 289.	Carrying pistol, bail,	250

"Witness our hands this the 10th day of October, 1908.

"R. M. Connell, Sheriff Choctaw County.

"J. M. Willis, County Attorney Choctaw County.

"Gross & Jordan, Attorneys for Petitioner."

Petitioner alleges that he is charged, by informations, with illegally selling whiskey, in nine different cases, and that the bond in the three last cases has been put at $1,000 each, and in the other cases at $500 each; that he made application to the Hon. W. T. Glenn, county judge of Choctaw county, for a reduction on all of said bonds, and that said application was refused; that petitioner's restraint is illegal and unauthorized, because the amount fixed as bail, in each case, is excessive; that petitioner is a poor man, and can give bail in the sum of $250 only, in each case, and prays this court to reduce said bail in each case to a reasonable amount.

Gross & Jordan, for petitioner.—On the question of excessive bail: 3 Am. & Eng. Encyc. of Law 680, and notes; *United States v. Lawrence,* 14 Cranch (C. C.) 518; *United States v. Browner,* 7 Fed. Rep. 86; *West v. Colquit,* 71 Ga. 559.

Charles West, Attorney General, and *W. C. Reeves,* Assistant Attorney General, for respondent.

DOYLE, JUDGE (after stating the facts as above). It is contended by the petitioner that his constraint is illegal and unauthorized, because the bail fixed in each charge by the county court is excessive, and therefore illegal and unauthorized; so that the proceeding before us is, in effect, an application for a reduction of the bail heretofore fixed by the county court in which the informations were filed. There are now pending, in said county court, 10 informations, and petitioner claims that, by reason of his poverty, he cannot give bail in the amount fixed by the county court.

The Bill of rights of this state provides:

> "Sec. 8. All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great.
>
> "Sec. 9. Excessive bail shall not be required."

When an indictment is rendered, or an information is filed, the court must assume, for the purpose of fixing bail, that the defendant is guilty of the offense charged. *Ex parte McClellan ante,* p.—, 97 Pac. 1019. Tssuming, then, that the defendant is guilty of these several offenses, we are asked to say that the bail, as fixed by the county court, is "excessive" within the inhibition of the Bill of Rights.

Bail is not to be deemed excessive simply because the particular person charged cannot give the bail required, but bail should never be exacted for the purpose of punishing a person charged with crime, for no person is punishable for an offense except upon a plea of guilty, or upon a conviction by a jury. Bail is exacted for the purpose of securing the attendance of the defendant at court, at all times when his presence may be lawfully required, and in rendering himself in execution of any judgment that may be pronounced upon him. In applications to this court, in *habeas corpus,* for reduction of bail upon the ground that the amount fixed by the trial court is excessive, this court will not interfere, unless it clearly appears that the amount fixed is excessive, and entirely disproportionate to the offense charged, and is, in effect, a denial of the petitioner's constitutional rights. It must clearly appear that the trial court has abused its discretion before this court will reduce the amount.

In the case of *Ex parte Duncan,* 53 Cal. 410, the rule was stated that it must be assumed that the defendant was guilty of each of the 10 distinct offenses charged against him. And in *Ex parte Duncan,* 54 Cal. 75, upon the second application, after two trials had been had without a conviction, it was held that this presumption still prevailed. In the Duncan case the bail was in aggregate $112,000 upon 10 indictments, and the offense charged was embezzlement, for which the maximum penalty is 10 years upon each conviction.

In the case at bar the maximum penalty is $500 fine, and six months' imprisonment, upon each conviction. It is argued with much earnestness, by counsel for petitioner, that the court should not exact as great an amount of bail upon each charge, where there are several informations pending—as in this case—as it would if only one or two cases were pending. We do not think that this argument has much force. The more informations pending, the stronger the probability of conviction, and, necessarily, the greater inducement to defendant to become a fugitive from justice.

It is also argued that, in the first five cases filed against the petitioner, the court fixed the amount of the bail in each case in the sum of $500, that in the next three cases filed the court fixed the amount of the bail in the sum of $1,000 in each case, and that the action of the court in so doubling the amount of the bail in the latter cases was arbitary and unreasonable. This is the only point that appeals to us. When the county court fixed the bail at $500 upon each of the first five cases filed—being cases Nos. 185, 189, 193, 194, and 265—it necessarily determined that such sum was sufficient to secure the attendance of the defendant to answer to the offense charged in such information. We do not understand why the amount should be doubled in cases Nos. 266, 268, and 275; the offense charged being the same in all of said cases.

The petitioner shows in his application that he is a poor man, and this is a circumstance that should receive some consideration. But the fact that defendant is unable to give such bail as the court believes sufficient to insure his appearance would not justify this court in reducing the bail. We think that, to avoid a possible injustice, the bail should be fixed in cases Nos. 266, 268, and 275 in the same amount, to wit, $500, as in the other cases. It was argued that, owing to the crowded condition of the docket, some time would elapse before a trial could be had upon these cases; but it must be remembered that under the law and the Constitution of the state defendant is entitled to a speedy trial; and any considerable bail required under these circumstances might be, *per se*, excessive, and contrary to the spirit of our laws, and especially the Bill of Rights and the Constitution of this state. We are of the opinion that defendant should be admitted to bail in the cases designated Nos. 266, 268, and 275, in the sum of $500. The amount of bail that will still be required of petitioner under this order, which we make in this proceeding, will still be large in the aggregate, amounting to $4,750,—said bail to be approved as by law provided.

The relator is remanded to the custody of the sheriff of

Choctaw county. The writ of *habeas corpus* denied generally, allowed in part.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

CAMPBELL, GEORGE V. UNITED STATES.

No. 661, Ind. T. Opinion Filed October 24, 1908.

(97 Pac. 1052.)

1. **LARCENY—Ownership—Evidence.** In cases of larceny it is essential for the prosecution to prove that the property was feloniously taken from the person named in the indictment as the owner, but this does not require that in every case direct proof of ownership shall be given.
2. **EVIDENCE—Corpus Delicti.** It is not essential that the **corpus delicti** should be established by evidence independent of that which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence.
3. **LARCENY—Nonconsent—Evidence.** The want of consent of the owner to the taking of his property alleged to have been stolen is an essential ingredient of the crime of larceny. The fact of nonconsent to the taking may be proven by facts and circumstances which sufficiently show that the property was feloniously taken, and the fact that the owner caused search to be made for the stolen property is a cogent circumstance to show want of consent to the taking.
4. **INSTRUCTIONS—Repetition.** Where a similar instruction has been given a requested instruction need not be given.
5. **EVIDENCE—Hearsay—Noncitizenship in Indian Tribe—Declarations.** Reputation or hearsay is admissible in all matters of pedigree, and so the declarations of the defendant that he is a white man, and his general reputation for 25 years that he was a white man, is sufficient when uncontradicted to prove noncitizenship in any Indian tribe or nation.
6. **APPEAL—Review—Failure to Preserve Record.** Where the record shows no objection was made and no exceptions taken, the error will not be considered by the court except in the interest of justice.
7. **ON MOTION FOR REHEARING—Appeal and Error—Harmless Error—Substantial Justice.** When a defendant is clearly proven to be guilty, this court will not reverse a conviction upon any technicality or exception which does not affect the substantial rights of the defendant.

(Syllabus by the Court.)

Error from the United States Court for the Central District of the Indian Territory, at Durant; Thomas C. Humphrey, Judge.

Campbell George was convicted of larceny, and brings error. Affirmed. Appealed to the United States Circuit Court.

Campbell George was indicted in the United States Court in the Indian Territory for the Central District of said territory, sitting at Atoka, which indictment was returned by the grand jury and filed in open court on the 10th day of October, 1903, wherein said defendant was charged with having on the 29th day of April, 1903, within that jurisdiction, committed the offense of larceny of a horse, the property of John Adkins.

The defendant entered a plea of not guilty, and on October 10, 1904, upon trial in said court at Atoka, he was found guilty as charged in said indictment. Whereupon he filed his motion for a new trial, which motion was by the court on November 1, 1904, sustained, and a new trial granted. The defendant having filed a motion for a change of venue the court ordered on January 7, 1905, that the venue be changed to the Durant division of said court, and directed the clerk of said court to forward there a duly certified copy of the indictment, together with the original papers and certified copies of the record entries in said case. At the June, 1905, term of said court at Durant, in said district, a second trial was had, and on June 9, 1905, the jury in said case returned a verdict finding the defendant guilty as charged. On June 13, 1905, the court overruled defendant's motion for a new trial, and sentenced defendant to imprisonment in the United States penitentiary at Ft. Leavenworth for a period of one year and one day.

A writ of error was allowed to the United States Court of Appeals for the Indian Territory, at South McAlester, and this case was pending there on the passing of that court, with the organization of the state of Oklahoma, and was duly removed to the Supreme Court of Oklahoma by virtue of the provisions of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) and the Constitution of Oklahoma, and is now before this court by virtue of section 170, art. 7, Const. Okla., and chapter 28 of the Sessions Laws of the First Session of the Legislative Assembly of the state of Oklamoma, entitled "An act creating a Criminal Court of Appeals, and defining the jurisdiction of said court," approved May 18, 1908 (Laws 1908, p. 291, c. 28).

John Adkins, the owner of the horse charged to have been stolen, was not present at the trial to testify as to the identity and ownership of the horse or his want of consent to the taking of the same by the defendant.

J. H. Riddle was the first witness called on behalf of the government. He testified that he lived near Globe, about 16 miles northwest of Coalgate and about 8 miles east from Pine and that John Adkins was at his place on Wednesday, the third day after his horse was stolen, inquiring for the horse, and, at his request, witness went with him, hunting for the horse . They found in the woods where a horse had been roached. The mane that had been cut off was black. They then went west to the "Pot" country, to the home of one Walter Vail. When they arrived there, Vail was not at home, and Adkins arranged with witness to go to the George place, in the Comanche country. Adkins then returned home. Witness proceeded west, and met Dera Duncan, who informed him that he had seen defendant with such horse; and, when witness reached Bob George's place, he found the horse there. Bob George is a brother of the defendant, and his place is about 130 miles from where the horse was taken. This was about two weeks after the horse was taken. Witness took the horse and brought him back, and delivered him to Adkins, who was a railroad laborer, living in a tent near Coalgate. The horse had a black mane, and had been roached, and was branded "A. D." Witness further testified that Adkins was a white man, and his camp was in the Choctaw Nation.

S. T. Stevens was the second witness for the government. He testified that he lived at Pine, was acquainted with defendant, Campbell George, and with Walter Vail, and that they were in his store on Sunday, the 29th of April, 1903,—the night of that day the horse was taken,—and that Pine is about 15 miles north of Coalgate.

Mrs. Fanny Pope was the third witness for the government. She testified that in April, 1903, she was living at Adelia postoffice, about five miles southwest of Pine, and that she knew Campbell George and Walter Vail, and that they passed her house on Sunday, and that she heard that Adkins lost a horse that night.

J. R. Hutchins was the fourth witness for the government. He testified that he knew the defendant, Campbell George, and in the spring of 1903 he met him and another man about three miles east of Mill Creek in the Chickasaw Nation, and that Mill Creek is about 15 miles west of Coalgate. This was on a Monday morning, about 9 or 10 o'clock. Dera Duncan was riding in the buggy with witness. Defendant and his fellow traveler were going west and were riding very fast. Defendant, Campbell George, was riding what witness described as a bay, chunky built, roached mane pony, and the other man was riding a bay mare. Witness was acquainted with J. H. Riddle, and met him a few days later, looking for Adkins' horse.

Dera Duncan was the fifth witness for the government. He testified that he was living at Mill Creek in the spring of 1903, and met defendant and another man in the road near Mill Creek, and now recognizes defendant as one of the men he met. Defendant was riding a bay pony that had a little white on his nose, and white specks on his hip, and mane roached, and also branded. The man with defendant was riding a bay mare. Witness saw the same horse about 10 or 12 days later in a livery stable at Mill Creek, where he pointed it out as the horse defendant was riding on that Monday morning when witness, in buggy with the witness Hutchins, met the defendant. The defendant and the man with him were going west, and were riding at an unusually fast trot.

J. J. Ward was the sixth witness for the government. He testified that in the spring of 1903, he lived west of Coalgate, and knew a man that was working in a tie camp named Adkins, and knew that he lost a horse about the same time witness lost a bay mare, and from information given by J. R. Riddle witness went to the Bob George place, in the Comanche country, and there found his bay mare, and that at that time Adkins' camp was about two miles from where witness lived. Witness does not know where Adkins is now.

J. H. Riddle, recalled on behalf of the government, testified that he has known defendant's family about 25 years, and that they are not Indians, and never claimed to be, and are noncitizens.

S. D. Stevens, recalled on behalf of the government, testfied that he has known Walter George, father of defendant, and his family for over four years; that they are renters in his neighborhood; that he never heard them claim to be citizens; that they are regarded as noncitizens; that they seem to be white people.

R. L. Williams testified on behalf of the government that he was a resident of Durant, lawyer by profession, and had seen defendant and his father several times, and had known of them for several years, and that he knew, by general reputation, that they were noncitizens, and knew, by reputation, that the defendant's mother was a noncitizen.

There were no witnesses sworn or testimony offered on behalf of the defendant.

J. G. Ralls, for appellant.

On the question of proof of ownership of stolen property and nonconsent for taking: *Oxier et al. v. United States,* 1 Ind. Ter. 85, 38 S. W. 331; *Cannada v. State,* 29 Tex. App. 537, 16 S. W. 341; *Garcia v. State,* 26 Tex. 209, 82 Am. Dec 605; *State v. Morey,* 2 Wis. 494, 60 Am. Dec. 439. On the question of proof of citizenship by reputation: *Lucas v. United States,* 163 U. S. 611.

T. B. Latham and *W. C. Reeves,* Assistant Attorney General, for appellee.

On the question of proof of ownership of stolen property: 1 Whar. Cr. Law 933; Rapalje on Larceny and Kindred Offenses, § 145; 1 Bishop Cr. Prac., § 707; 1 McClain on Criminal Law, § 601 (612); *State v. Stanley,* 48 Iowa 221; *Barnes v. People,* 18 Ill. 52; *Lawrence v. State,* 4 Yerg. 145. Proof of nonconsent of owner to taking: Rapalje on Larceny and Kindred offenses, 135, 158; *Wilson v. State,* 12 Tex. App. 481; *State v.*

Osborne, 28 Iowa. 9. Proof of citizenship by hearsay: *Comstock v. State,* 14 Neb. 205; *Reed v. State,* 16 Ark. 499; *Kelley's Heirs v. McGuire,* 15 Ark. 555.

DOYLE, JUDGE (after stating the facts as above). Twenty two assignments of error are alleged in the petition, and are argued in the brief.

The principal question presented is set forth in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, fifteenth, and sixteenth assignments of error. These all go to the competency and sufficiency of the evidence, to show ownership in John Adkins, and nonconsent of said owner to the taking, as alleged, and to show venue, also the conclusion that the verdict is not supported by sufficient evidence. In this case the able counsel for defendant, mindful of the fact that larceny is the most technical in its distinctions of all common-law felonies, interposed continuous objections to the testimony offered, and said assignments of error involve, first, the objections so made and exceptions taken; second, the refusal to give instructions requested, predicated upon the proposition that all of said testimony was hearsay, and therefore incompetent. In support of his contention counsel for Appellant cites the cases of *Oxier et al. v. United States,* 1 Ind. Ter. 85, 38 S. W. 331; *Cannada v. State,* 29 Tex. App. 537, 16 S. W. 341. We do not believe that the rule enunciated in the foregoing cases applies to this case at bar. To support a conviction there must be evidence that the property in question was actually stolen. In what manner may this proof be made? Must it always be direct and positive? Is it absolutely essential in all cases that the proof of the *corpus delicti* should be established independent of the other elements of the offense? In many, and perhaps most, cases to support a conviction, direct proof that the property was feloniously taken from the person named in the indictment as owner is necessary. Yet it is not essential in all cases that there should be any direct evidence upon this point. The application of the rule must always depend upon the facts of the case. Appellate courts should carefully consider and guard against so construing the law that a proper rule of evidence would be preverted into a means of escape from the merited punishment of an offender. Circumstantial evidence may be resorted to for the purpose of proving the *corpus delicti* in the same way and to the same extent that it may be for the purpose of connecting the accused with the commission of the offense. Mr. Bishop, in discussing the subject, says:

"If we look at the matter as one of legal principle, we can hardly fail to be convinced that while the *corpus delicti* is a part of the case which should always receive careful attention, and no man should be convicted until it is in some way made clear that a crime has been committed, yet there can be no one kind of evidence to be always demanded in proof of the facts any more than of any other." (1 Bishop on Criminal Procedure, § 1071).

Mr. McClain says:

"The *corpus delicti* need not be shown by direct evidence, that is, there need not necessarily be proof of loss of property by theft distinct from the fact showing that property found in the defendant's possession was wrongfully taken from the owner thereof. Proof of the act is not necessary where the circumstances can only be explained by a felonious act." (1 McClain on Criminal Law, § 612).

Neither is it essential that the *corpus delicti* should be established by evidence independent of that which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence.

"Absolute positive evidence is not necessary to establish the *corpus delicti* of a crime, but proof thereof may be made by circumstantial evidence; and, if there is a reasonable inference deducible from the evidence of the existence of the *corpus delicti,* it is the duty of the court to submit the question of the sufficiency and weight of the evidence tending to support that inference to the jury." (*Martin v. State,* 125 Ala. 64, 23 South. 92 —following *Granison v. State,* 117 Ala. 22, 23 South. 146; *Roberts v. State,* 61 Ala. 401.)

"The same general evidence of property is admissible in criminal cases as in civil cases. Possession with general acts of ownership over the horse are sufficient to warrant a verdict where there is no evidence offered to rebut or contradict the right of property." (*Barnes v. People,* 18 Ill. 52 65 Am. Dec. 699).

It never was the rule of the common law that nonconsent must be shown, and that the owner of the stolen property must be produced as a witness to prove such nonconsent, and consent is a matter simply of defense. The present laws of our state provide a penalty for stealing domestic animals, but do not define the offense, but simply provide that, if any person shall steal the animals mentioned, he shall be guilty of a felony. Therefore the common-law rule now applies to our state, but here in this case nonconsent is averred in the indictment and must be proved. We believe the evidence offered was sufficient. Mr. McClain in discussing the question says:

"Where the question of want of consent of the owner becomes material, it is not necessary to prove such want of consent by the evidence of the owner himself. It may be shown by others having knowledge of the facts." (1 McClain on Criminal Law, p. 558).

In *People v. Jacks,* 76 Mich. 218, 42 N. W. 1134, Sherwood, C. J.. in speaking for the court, says:

"We think the fact of nonconsent to the taking may, however, be proved by any other person having knowledge of the facts as well as by the owner or the person having control of the property at the time, or by facts and circumstances which sufficiently satisfy the jury that the property was feloniously taken."

In *Kemp v. State,* 89 Ala. 52, 7 South. 413, the court says.

"There was evidence tending to connect the defendant with the commission of the offense charged. His presence sufficiently near the scene of the crime to have been the author of it, and the evidence that he was provided with the means with which the act was done, appears in evidence. It further appears that he hastily left the immediate vicinity. This was certainly proper to go to the jury as a basis for an inference of guilt. * * * The fact that the owner caused search to be made for the stolen property is a cogent circumstance to show want of his consent to the taking."

Rapalje on Larceny and Kindred Offenses, § 135; *Rains v. State,* 7 Tex. App. 588; *State v. Osborne,* 28 Iowa, 9; *People v. Dean,* 58 Hun. 610, 12 N. Y. Supp. 749; *Spruill v. State,* 10 Tex App. 695.

It is also insisted that the evidence is insufficient to show venue. We think the fact that the larceny was committed within the jurisdiction of the Central District of the Indian Territory was sufficiently proved, and no error was committed by the trial court in so ruling.

We have set out the evidence somewhat in detail, for the purpose of showing that it presented a proper case for the determination of the jury under the authorities above quoted. The circumstances shown; standing as they do wholly uncontradicted and unexplained, lead to but one natural conclusion, namely, that the larceny charged was committed, and that the defendant, Campbell George, committed it. On the Sunday the horse disappeared he and Walter Vail were seen by various witnesses near the camp of John Adkins. They left there that day or night, and on the next day were seen near Mill Creek, defendant with the Adkins horse, and Walter Vail with the witness' (Ward's) horse. They were riding rapidly westward. The horse defendant was riding had been roached. It is shown that John Adkins immediately instituted a search for his horse, and with witness Riddle found, near his home, where the horse had been roached. He then, with Riddle, traced and followed his horse to Walter Vail's in the "Pott" country. They found Walter Vail gone from his home. Riddle then, on Adkins' request, proceeds to the Comanche country, and finds at the place of the defendant's brother, Bob George, Adkins' horse and Ward's horse, which had been stolen about the same time. Riddle takes possession of Adkins' horse, brings him back, and delivers him to Adkins. The horse is identified by two witnesses as the one defendant had possession of. The effect to be given to the foregoing facts is strongly reenforced by the failure to explain defendant's possession of the horse, or to offer the testimony of his brother, Bob George, or Walter Vail. After a careful examination of the record we find there is no such absence of evidence of guilt as to warrant the interference of this court, and we have no hesitation in saying that the facts and circumstances thus shown, when all taken together, and in the absence of any explanation, are sufficient to produce in the minds of reasonable men an irrestible conviction of the defendant's guilt.

The next errors assigned, being the twelfth, thirteenth, and fourteenth, go to the question of the sufficiency of the instructions on circumstantial evidence, and the refusal of the court to give the instructions requested by defendant. One of the instructions so requested is as follows:

"The court instructs the jury that the facts relied upon to show the defendant's guilt must not only be inconsistent with his innocence, and, if the facts are susceptible of two interpretations, one of innocence and one of guilt, the interpretation of innocence must be accepted on the defendant's behalf."

This was refused by the court, and the jury was instructed as follows:

"To work conviction, each of the necessary allegations to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and the facts and circumstances proven must be not only inconsistent with the innocence of the accused, but inconsistent with any other conclusion but that of guilt."

This instruction is not as complete as it should be, but in our opinion it is as clear and complete as the instruction requested, and under the rule that, where a similar instruction has been given, a requested instruction need not be given, in our opinion no error was committed.

The seventeenth assignment of error is based upon the fact that, after resting the case, defendant declined to offer any testimony. The United States attorney immediately requested that the case be reopened for the purpose of introducing further evidence as to the citizenship of the defendant. The court granted this permission over the objection of defendant. This request was addressed to the sound discretion of the trial court, and, unless it appears that such discretion was abused to the prejudice of the substantial rights of the defendant, this court cannot consider the same. In our opinion there was no error in the ruling of the trial court.

The eighteenth, nineteenth, twentieth, and twenty-first assignments of error are predicated upon the proposition that there was none other than opinion and hearsay evidence offered to sustain the allegation of the indictment that the defendant was not then and there a member of any Indian tribe or nation, and there was no competent evidence in proof of said allegation.

"To establish pedigree, family hearsay is essential, since, if what has been handed down in families cannot be in this way proved, pedigree could not in most cases be proved at all." (Wharton's Crim. Ev. § 233. See, also, 234).

In *Comstock v. State,* 14 Neb. 205, 15 N. W. 355, Lake, C. J., says:

> "The next objection is to the ruling of the court on the admission of evidence. The prosecuting witness was asked what relation she bore to the prisoner, and answered that she was his daughter. It is claimed that this was incompetent testimony, for the reason that the fact of her parentage was one of which necessarily she could know nothing except as hearsay. We do not regard this objection as sound. It is certainly competent for one who from his earliest recollection has been a member of one's family, given his name, and reared in the belief, and in all ways given to understand that he is a son in the household, to testify of his parentage. His testimony may not be satisfactory or conclusive of the fact, but it is at least admissible for what it is worth in the minds of the jury, and clearly sufficient to make a *prima facie* case, thus throwing the burden of overcoming it upon him who controverts it."

To the same effect is the doctrine in the case of *Reed v. State,* this being a case where Wyandotte Indians were passing through Desha county, Ark., and camped for a few weeks in a white settlement, and while there one of their number was killed by defendant, Reed. Trial and conviction was had and an appeal taken to the Supreme Court of Arkansas, one of the grounds being that, as deceased was alleged to be a Wyandotte Indian, proof of the same was essential, and could not be made by hearsay evidence. Chief Justice English in delivering the opinion of the court, among other things, said:

> "The court below was right in deciding that it was competent to prove by common reputation that the deceased was a Wyandotte Indian. The people of this country being generally Anglo-Saxon, a person coming into any community of a different race bears upon him such peculiar marks of his nationality as to enable the community very soon to form an opinion in reference to it sufficiently certain for all the purposes of legal identity. It stands upon the same footing as with the proof of pedigree. The witness Sexton stated that he heard from those with the Indian that was killed that he was a Wyandotte Indian, and to this evidence the defendant objected, and excepted to its admission by the court. This statement, if taken by itself, is not satisfactory, but, when taken in connection with the testimony of the other witnesses who testified on the trial, it was doubtless competent evidence. * * * These remarks are made in reference to the competency of the testimony. The jury were the judges of its sufficiency upon this point as upon others."

We think the testimony offered on behalf of the government was competent, and at least clearly sufficient to make a *prima facie* case. In our opinion the trial court committed no error in ruling that said testimony was competent.

It is claimed in conclusion, by the twenty-second assignment of error, that the court errer in delivering to the jury the certified copy of the indictment containing a copy of the former verdict printed upon it, the name of Campbell George, and the name of the foreman having been added to the printed form. The record shows that no objection was made on the part of the defendant to this certified copy, and counsel for defendant offers no argument in support of this last assignment. It is a rule of this court that assignments of error based upon rulings where the record shows that no objection was made, and where no exception was taken, will not be considered by this court, except in the interest of justice.

We believe the defendant had a fair and impartial trial. Under the well-settled rule, where there is sufficient evidence in the record upon which the verdict may be fairly based, as in this case, this court will not reverse the judgment on the ground of the insufficiency of the evidence. We find no prejudicial error in the record, and for the reasons given in this opinion the judgment of the United States Court of the Central District of Indian Territory must be affirmed.

Judgment affirmed.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

On Motion for Rehearing.

Denied February 20, 1909.

PER CURIAM. Through respect for the able counsel who represents the defendant, we have carefully gone over the entire record in this case, in connection with the motion for a rehearing, and the authorities cited. The result of our deliberations has strengthened our confidence in the views expressed and the conclusion reached in the original opinion. It would be a waste of time to repeat what was said there.

We desire to reaffirm the announcement, heretofore made, that when a defendant is clearly guilty this court will not reverse a conviction upon a technicality or exception which does not affect the substantial rights of the defendant. This is the settled policy of this court.

We have no sort of doubt of the guilt of the defendant, and while there may have been some irregularities in his trial, yet we believe that he has been fairly tried and properly convicted. We cannot understand how an honest man could act as the testimony in this case shows that defendant has acted. His conduct is absolutely inconsistent with his innocence, and adds increased force to the testimony of the prosecution, and makes practically certain that which otherwise might have been open to dispute. He had once before been convicted. He therefore knew the convincing character of the evidence against him. If his connection with the horse was honest, he could have explained it by producing Bob George and Walter Vail as witnesses in his behalf.

But in the face of the former conviction, and with a full knowledge of the testimony against him, which, if untrue, could have been contradicted or explained by Walter Vail and Bob George, the defendant remained as dumb as an oyster, and refused to place these witnesses on the stand or to account for their absence, but depends alone upon the ability of his counsel to make a purely technical defense. It is unconceivable to us how an innocent man could be induced to adopt such a course. If upon any question in the case the testimony for the prosecution was uncertain, this uncertainty was cured by the conduct of the defendant. An honest man, when charged with theft, and proven to have been in possession of recently stolen property, will take some steps to show the good faith of such possession and to vindicate his character. It is true that the law does not require him to do so, but if it is shown that witnesses are accessible to him by whom he can prove his good faith, if he did act in good faith, and he refuses to produce those witnesses, he cannot complain if this failure is considered as a circumstance against him. Such conduct is a just basis for the conclusion that if those witnesses were produced their testimony would not contradict, but would confirm, the testimony against the defendant.

By failing to offer any evidence when it was in his power to do so, if he was innocent, the defendant cannot be heard to complain if the jury placed the strongest construction possible against him upon the evidence offered by the prosecution, and this court approves the verdict at which they arrived. It is our purpose to sustain the action of trial courts and the verdicts of juries in their efforts to enforce the law, punish criminals, and thereby protect honest and lawabiding people in the peaceable enjoyment of their property and lives, and, when a defendant is proven to be guilty, he need not look to this court for relief upon any technicality which does not affect his substantial rights.

Motion for rehearing denied.

WILLIAM JOHNSON V. STATE.

No. 288. Opinion Filed October 24. On Rehearing November 9.

(97 Pac. 1059.)

1. **JUDGMENT—Modification—Vacation—Time—New Trial.** First. If it appears to the trial court, after overruling a motion for a new trial or a motion in arrest of judgment, that there was irregularity in obtaining the judgment, it may, of its own motion, modify or set aside its order overruling the motion for a new trial or the motion in arrest of judgment. This may be done at the term of the court at which the order was made; but after final judgment has been rendered, and the term has expired, there must be a substantial compliance with the statute, to give the court further jurisdiction.

   Second. When the trial court grants a motion for a new trial upon the ground of irregularities in obtaining the verdict, it is not necessary for the court to pass upon a motion in arrest of judgment, and the case stands for trial, just as if no verdict had been rendered therein.

2. **INDICTMENT—Decedent—Weapon—Description.** First. Where an indictment charges the defendant with the murder of "Mary Cuppy," it is not necessary to allege that "she" was a human being, this being a matter of proof, rather than of pleading.

   Second. Where an indictment for murder alleges that the wounds that caused death were inflicted with "a piece of two-inch plank," or "an ax handle," it is not necessary to allege that these instruments were deadly weapons, or to give their size, weight, or dimensions.

3. **CONTINUANCE—Absent Witnesses—Time to Prepare for Trial—Application—Discretion—Review.** First. When an application for a continuance fails to give the names of absent witnesses, or to state the facts that defendant expects to be able to prove if a continuance is granted him, it is fatally defective.

   Second. When an application for a continuance is based upon the ground of want of time in which to prepare for trial, and it appears that the indictment against defendant has been pending for six or seven weeks during which time the defendant has been represented by counsel, the application is addressed to the sound discretion of the court, and his action is not subject to review, in the absence of a showing of abuse of this discretion.

4. **JUDGES—Change of Judge—Jurisdiction—Trial—Objections—Appeal—Presumption of Regularity of Court Proceedings.** First. Under the statute, but one change of judge can be had.

   Second. The fact that the regular judge of a district may hold court in the same district and at the same time that a special judge is trying a case, in no manner affects the jurisdiction of the special judge to try such case.

   Third. Objections to alleged errors, committed during a trial, must be made in apt time, so as to allow the trial court to rule upon the objections before action is taken. It is too late to complain after the trial is ended.

Fourth. Every presumption must be indulge in in favor of the regularity of the proceedings of a court of record, and the burden is upon the party who would impeach that regularity to do so by the best evidence obtainable.

5. **VENUE—Change—Discretion—Burden of Proof—Evidence.** First. An application for a change of venue is addressed to the sound discretion of the trial judge, and, in the absence of an abuse of this discretion, his judgment is not subject to review.

Second. The burden is upon the defendant to clearly show, upon an application for a change of venue, his inability to obtain a fair and impartial trial in the county in which the offense was committed.

Third. See facts in opinion of court, which did not constitute a sufficient showing to warrant a change of venue.

6. **JURY—Competency—Examination—Challenge—Statutes.** First. The fact that a juror states, on his **voir dire** examination, that he has previously sat as a juror upon the trial of a murder case, does not render him subject to challenge upon the ground of implied bias.

Second. The court must be clearly satisfied of the fairness of a juror, and his freedom of prejudice or bias against the defendant, or he should be excluded from the jury.

Third. The court is not bound by the answers of a juror on his **voir dire** examination, but may take such other means as may be necessary to determine the competency of the juror.

Fourth. The enumerated causes for challenges in the statute are not exclusive of all other causes not enumerated.

Fifth. When a juror has an opinion as to the guilt of the defendant, based upon rumor or from reading the public press, and the court is satisfied that the opinion is such that it will not combat the evidence or resist its force, such opinion, of itself, will not render the juror incompetent to sit in the case.

Sixth. The court should resolve all doubts as to the competency of the juror in favor of the defendant.

Seventh. It was proper to allow counsel for defendant to inquire as to what was the verdict rendered by the jury, of which the juror Willis had formerly been a member, in order that they might intelligently exercise their peremptory challenge.

7. **APPEAL—Review — Objections — Evidence — Presentation.** When a defendant seeks a new trial upon the ground that the trial court erred in the admission of evidence against him, his counsel should, in their presentation of this ground for a new trial to this court, point out the alleged improper evidence objected to, and also give the names of the witnesses, and so directly call the attention of this court to the ground of the objection that the error, if any, can be passed on intelligently; otherwise this court would not know what

8. **APPEAL—Review—Instructions—Errors Must be Specified.** In support of a motion for a new trial, upon the ground that the court erred in refusing to give the instructions requested by the defendant. particular objection counsel was relying upon.

or in misdirecting the jury as to the law of the case, counsel for defendant should, in their presentation of this ground, point out the specific errors complained of.

9. **FORMER JEOPARDY—Plea—Striking from Record.** First. When a defendant has been tried and convicted of an offense, and a new trial has been granted him, and, upon his being placed upon trial on the same indictment again, a plea of former jeopardy, based upon the first conviction, does not present a defense in the case.

Second. When a plea of former jeopardy does not state facts which constitute a defense, it is not error for the trial court to refuse to direct the jury to find a special verdict on such plea, but it should be stricken from the record of the case.

10. **MURDER—Capital Punishment.** See facts stated in opinion, which sustain a verdict of guilty of murder with capital punishment.
(Syllabus by the Court.)

Error from District Court, Pottawatomie County; B. B. Blakeney, Special Judge.

William Johnson was convicted of murder, and he brings error. Affirmed. Rehearing denied.

On the 26th day of March, 1908, William Johnson (who will hereafter be called "the defendant") was indicted in the district court of Pottawatomie county for the murder of Mrs. Mary Cuppy. On the 6th day of April thereafter, the case was reached for trial. The following proceedings were had: A jury was empaneled, and the defendant entered the plea of guilty. The court submitted the case to the jury upon this plea alone, and the jury found defendant guilty of murder, and assessed his punishment at death. Counsel for defendant filed a motion for a new trial and also for arrest of judgment. These motions were overruled by the court, and defendant was duly sentenced to be hanged. Defendant began to take steps to bring the case to the Supreme Court by writ of error, but they were never perfected.

Sections 5588 and 5589, Wilson's Rev. & Ann. St. Okla. 1903, are as follows:

"The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

"The Governor may thereupon require the opinion of the Judges of the Supreme Court or any of them, upon the statement so furnished."

In accordance with these statutes, the judge that presided at the trial caused a certified copy of the judgment and proceedings had on the trial to be forwarded to the Governor of the state. In accordance with the statute, the Governor required the opinion of the Supreme Court. The Supreme Court held that the conviction of the defendant was irregular. (This opinion is published *ante,* p. 154, 21 Okla. 40, 96 Pac. 26).

This opinion was handed down on the 6th day of May, 1908. At this time the defendant had not perfected his appeal to the Supreme Court. The district court was still in session in Pottawatomie county. Upon being advised that the Supreme Court had decided that the conviction of the defendant was irregular, the judge of the district court of Pottawatomie county, on his own motion, set aside his orders overruling the motions of defendant for a new trial, and in arrest of judgment, and then sustained the motion for a new trial, but took no further action on the motion in arrest of judgment. All this was done over the objections and exceptions of counsel for defendant.

Defendant was again placed on trial for the offense charged in the indictment, and was again found guilty by the jury, and his punishment assessed at death. An appeal was taken to the Supreme Court to review this judgment of conviction, and was pending in said court when the Criminal Court of Appeals was created. The case was then transferred to this court, as the statute directs. The facts of the case are sufficiently stated in the opinion of the court.

C. G. Pitman and *A. M. Baldwin,* for appellant.—

On the question of description of deceased in indictment: Anderson's Law Dictionary, p. 513; 1 Wilson's Rev. & Ann. St. 1903, p. 593; *Commonwealth v. Macloon,* 101 Mass. 6-8.

On the question of change of judge: Session Laws 1903, p. 221; *Garrison v. Territory,* 13 Okla. 692; *People v. Hubbard,* 22 Cal. 35.

On the question of change of venue: Session Laws 1903, p. 220; *Garrison v. Territory,* 13 Okla. 690; *State v. Olds,* (Oreg.) 24 Pac. 394; *Edwards v. State,* 25 Ark. 444; *People v. Yoakum,* 53 Cal. 566; *Higgins v. Commonwealth,* (Ken.) 21 S. W. 231.

On the plea of former conviction: Wilson's Rev. & Ann. St. 1903, § 5534; *People v. Fuqua,* 61 Cal. 377; *People v. Heilbing,* 59 Cal. 567.

Charles West, Attorney General, and *W. C. Reeves,* Assistant Attorney General, for the state.—

On the sufficiency of indictment for murder: *Walcher v. Territory,* 18 Okla. 528. Requisite description of deceased. Wharton on Homicide, 3rd Ed. (Bowlby) p. 865. note 39 and citations; *Bowers v.State,* 122 Wis. 163; *Ogden v. State,* 15 Tex. App. 454. Requisite description of weapon: 2 Bishop's New Crim. Proc., § 514 and citations.

On the question of a second change of judge: Constitution, art. 7, sec. 9; Session Laws 1903. c. 25, art. 1, sec. 1.

On the question of change of venue: 1 Bishop's New Crim. Proc., sec. 71, par. 5, and citations; 12 Cyc. 243, note 56 and citations.

On the plea of former conviction: Wilson's Rev. & Ann. St. 1903, § 5556; 1 Bishop's Crim. Law (4th Ed.) § 844; *Martha v. State,* 26 Ala. 72; *Simeo v. State,* 9 Tex. App. 338; *Johnson v. State,* 34 Tex. Crim. Rep. 115; *Ellis v. State,* 25 Fla. 702; *State v. Lee,* 46 La. Ann. 623; *State v. Hite,* 9 Yerg. (Tenn.) 357; *State v. Haynes,* 36 Vt. 667.

On the question of court's action on granting new trial: Wilson's Rev. & Ann. St. 1903, § 4760; 29 Cyc. 1028; *List v. Jockhick,* 59 Kan. 143; *Huber Mfg. Co. v. Sweeney,* 57 Ohio. St. 169, 173; *Slocum v. Fairchild,* 7 Hill (N. Y.) 292; *Snow v. Vandeveer,* 33 Neb. 735; *Coffield v. Warren,* 72 N. C. 223; *Watson v. Williamson* (Tex.) 76 S. W. 793.

FURMAN, PRESIDING JUDGE. (after stating the facts as above). The court has had the benefit of able and exhaustive briefs and oral argument in behalf of both the defendant and the state. The record in this case contains 810 pages. Several hundred exceptions were reversed during the trial. In view of the supreme importance of this case, all of these exceptions have received careful consideration; but as it would fill a large volume to discuss them in detail, we will confine our discussions to those that go to the substantial merits of the case, and to such others as present questions of practice, which should be settled in this state. We will consider them in the order in which the matters complained of arose during the trial in the court below.

First. The defendant complains of the action of the trial court in reconsidering and setting aside, of its own motion, its former action in overruling defendant's motion for a new trial, and also the motion in arrest of judgment and in then sustaining said motion for a new trial, upon the ground that the action of the court in formerly overruling said motions was *res judicata.* In support of this contention, defendant cites section 4760, (Wilson's Rev. & Ann. St. 1903,) in the Oklahoma Statutes, which is as follows:

> "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: First, By granting a new trial for the cause, within the time and in the manner prescribed in section two hundred and ninety-nine. Second, By a new trial granted in proceedings against defendants constructively summoned, as provided in section seventy-eight. Third, For mistake neglect or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth, For fraud, practiced by the successful party, in obtaining the judgment or order. Fifth, For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth, For the death of one of the parties before the judgment in the action. Seventh, For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. Eighth, For errors in a judgment shown by an infant in twelve months after arriving

at full age, as prescribed in section four hundred and four. Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment."

It is true that in the cases *of Lookabaugh v. Cooper,* 5 Okla. 102, 48 Pac. 99, and *Long v. County Commissioners,* 5 Okla. 128, 47 Pac. 1063, the Supreme Court of Oklahoma Territory did announce the doctrine that:

"In the absence of a showing of irregularity, fraud, unavoidable casualty or misfortune, the district court has no power to set aside its order overruling a motion for a new trial, upon a reconsideration of the same motion already passed upon, and a reversal of such order can be had only by proceedings in error in the Supreme Court."

But we are of the opinion that the principle announced in these cases is not applicable to the case at bar. By the express terms of the statute relied upon, the trial courts have power to vacate or modify their own judgments or orders, at or after the term at which such judgment or order was made, and grant a new trial for "irregularity in obtaining a judgment." In the opinion of the Supreme Court referred to in the statement of this case, it was said: "We are of the opinion that there are such irregularities disclosed by the record that we cannot say that the defendant was convicted according to the forms of law." We concur in all that was said by Mr. Justice Dunn in this opinion. When the opinion of the Supreme Court was presented to the trial court, at the same term at which the order was made, and the irregularities in obtaining the judgment were pointed out, it was the duty of the trial court, on its own motion, to set aside its order overruling appellant's motion for a new trial and in arrest of judgment. There was, therefore, no error in this action. We are fully sustained in this view by the Supreme Court of Oklahoma in the case of *McAdams v. Latham,* 21 Okla. 611, 96 Pac. 584. In this case Chief Justice Williams said:

"A trial court has a very wide and extended discretion in setting aside and modifying proceedings had in its own court, if it does so at the same term at which the proceedings were had; but after final judgment has been rendered, and the term expires, there must be a substantial compliance with the statute to give the court further jurisdiction."

The trial court then sustained defendant's motion for a new trial, but did not take further action on the motion in arrest of judgment, and, indeed, could not have properly done so, as there was then no judgment to arrest; and the case stood on the docket of the court, just as if there had been no trial.

Second. Defendant challenges the sufficiency of the indictment, because it described the instruments with which the homicide was committed as "a piece of two-inch plank and an ax handle." The contention of defendant is that the size and weight of the piece of plank and the ax handle should have been set out in the indictment, or that it should have been alleged that they were deadly weapons. Reason and authority are against these contentions. Suppose that it had been alleged that defendant had choked the deceased to death, either with his fingers or with a piece of string or cloth. Would it have been necessary to give the size of and the weight of his fingers, or of the string or cloth, or to have alleged that they were deadly weapons? Clearly not. The death of the deceased conclusively shows the deadly character of the instruments used.

In the case of *Drye v. State,* 14 Tex. App. 191, this very question came up and the court said: "The particulars of the weapon—as that it was of such a length and breadth—need not be given; to say, for example, that it was 'a certain wooden stick' will suffice." The court then cites a number of cases supporting this proposition.

In *Jeffries v. Commonwealth,* 84 Ky. 238, 1 S. W. 442, the court says:

"The objection that the indictment fails to state the pistol was a deadly weapon, and was at the time loaded with a leaden ball or other hard substance, cannot be sustained; for the shot could not have been fired, nor a fatal wound inflicted thereby, if the pistol had not been a deadly weapon and loaded. A formal statement of these facts was not, therefore, indispensable."

In *State v. Smith,* 61 N. C. 340, the court held that an indictment was sufficient when it alleged that death was inflicted with "a certain wooden stick."

Bishop's New Criminal Procedure, vol. 2, § 514, is as follows:

"The particulars of the weapon, as its length and breadth, need not be given; thus it suffices to say that it was a wooden stick. * * * It need not be added that the weapon was dangerous or deadly."

We believe that these precedents are right in principle, and they will be adopted and followed by this court.

Counsel for defendant also contends that the indictment is defective because it does not allege that the deceased, Mary Cuppy, was a human being. It is true that our statute defines homicide to be "the killing of one human being by another." but this does not mean that the indictment must allege that the person killed or the person doing the killing were, either or both, human beings. An indictment is understood according to the import of the common language used therein. It is true that in some instances the name of a human being is given to brutes, but this is so unusual as not to affect the rule of law that the use of the name of a human being imports a human being. When a name, usually applied to human beings, is used in a deed or in any legal document, is it necessary to allege the possessor of that name is a human being? Certainly not. As to whether a human being or a brute was killed, is a matter of evidence and not one of pleading.

Our views upon this question are well expressed by the Supreme Court of Wisconsin, in *Bowers v. State,* 122 Wis. 163, 99 N. W. 447:

"It is said that this charge is insufficient, because it does not allege that the plaintiff in error murdered a 'person' or a 'human being.' The ingenuity of the point is only excelled by its absurdity. An allegation of the murder of George Bowers, Sr., is an allegation of murder of a person, under all reasonable rules of construction of language."

There is no safer or higher authority on Criminal Law than Mr. Wharton. In the third edition of his great work on Homicide, page 865, he says: "An indictment for a homicide of a named person need not aver that he was a human being, that fact appearing from the name." The following authorities are to the same effect: *Palmer v. People,* 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; *State v. Stanley,* 33 Iowa, 526; *Merrick v. State,* 63 Ind. 327; *Ogden v. State,* 15 Tex. App. 454.

Therefore, upon reason and authority, we hold that it is not necessary for an indictment for murder, which gives the name of a human being to the deceased, to go further and allege that the deceased was a human being; and also that it is not necessary to give the dimensions and weight of the instrument with which death is inflicted, or to allege that it was a deadly weapon.

Third. Defendant contends that there was error in overruling his application for a continuance. The record shows that the indictment in this case was returned against defendant in the district court of Pottawatomie county on the 26th day of March, 1908, charging him with the murder of Mary Cuppy, on the 23rd day of January, 1908, that on March the 30th, it being made to appear to the court that the defendant was without funds to employ counsel, the court appointed C. G. Pitman, an attorney of that bar, to defend him; that on the 6th day of April this case was called for trial; that the defendant then entered the plea of guilty to the charge of murder, and that the proceedings were had which are set out in the statement of this case; that on the 6th day of May, 1908, the Supreme Court held that the judgment against defendant, upon his plea of guilty, was irregular; that in conformity with this opinion the trial court, on the 9th day of May, sustained a motion for a new trial, and set the case down for retrial on the 12th day of May. The application for a continuance does not state the name of a single absent witness whose presence he desired to obtain; neither does it state a single fact which defendant expected to be able to prove, if a continuance was granted him. The nearest approach to anything of the kind is the following statement in the application:

"The defendant believes, if the trial of this cause is continued until the next term of the court, defendant's relatives will assist him and will afford him means, by which he can properly prepare his defense in support of which a certain letter is hereto attached and made a part of this application."

No such letter is in the record. The record shows that defendant had the assistance of counsel from March 30, 1908; and we wish to express our high appreciation and commendation of the zeal and ability with which this defense has been conducted. Everything which human ingenuity could suggest has been done by counsel for defendant. Aside from the manifest insufficiency of the application for a continuance, this court feels confident that if a single witness had been in existence whose testimony could have been in the least beneficial to defendant, the industrious, zealous, and able counsel who represented him would have made that fact appear in the motion for a continuance. The record of the trial also shows that no injustice was done defendant in overruling his application for a continuance, for the reason that the homicide occurred at a place near where the trial was had, and that every witness who could have known anything about the matter either testified in the case, or was easily accessible to the process of the court if his presence and testimony had been desired by defendant. This court is satisfied that all of the material facts of this case were before the jury, and are in the record now. For all of these reasons, this court holds that the trial court did not err in refusing to grant a continuance in this cause.

Fourth. Defendant contends that the special judge, B. B. Blakeney, was without jurisdiction to try this case for two reasons: First. That appellant had filed a motion for a change of judge from said special judge. Second. That the regular district court of the Fourth judicial district was sitting in and for Pottawatomie county, and was in session during a part of the time that the trial of defendant was in progress, and that, therefore, the trial of this defendant by the special judge was contrary to law.

The first contention of counsel, under this head, is disposed of by the plain language of the very statute which prescribes for a change of judge. Section 1 of article 1 of the Session Laws of

Oklahoma of 1903, p. 220, c. 25, says: "Provided that not more than one change from the county, and one change from the judge shall be allowed." The court was therefore without power to grant the motion for a change of judge, it appearing from the record that Hon. B. B. Blakeney, who tried this case as special judge, was doing so on account of the fact that defendant had already taken a change of judge from Hon. Wm. Maben, the regular judge of that district.

The second contention, that the regular judge of the district was holding court in the same county, and during the time that the special judge was trying defendant, is without support in the record. It is asserted in the motion for a new trial only, and again in the motion for an arrest of judgment. These motions are signed by counsel for defendant, but neither of them is supported by affidavit. Every presumption must be indulged in, in favor of the regularity of the proceedings of courts of record, and the burden is upon the party who would impeach that regularity to show the alleged irregularity by the best evidence in his power. This should have been done by the record evidence of the fact. But even if it had been shown that the regular judge of that district was holding court at the time of this trial in the same county, and this objection had been made in apt time, this would not have affected the powers of the special judge. Again, the record does not show that any objection was made to this matter by defendant until after his conviction. It was then too late to complain. Objections should be made promptly, so that, if error is about to be committed, it may be avoided.

This precise question has been passed upon by the Supreme Court of Kansas in the case of *List v. Jockheck*, 59 Kan. 149, 52 Pac. 422. The court said:

"If the record showed that the plaintiff had objected to this division of judicial authority, it would present a serious question; but it does not appear that such objection was made; besides, the question may well arise as to which of these judges was rightfully in the exercise of the authority to hold court. It would seem that, if the proceedings of either one should be declared void or even erroneous it would be the proceedings before the regular judge. He, having knowledge of his disqualification to try the case in question, and having given away for its trial before a judge pro tem., should take notice of the fact that he was temporarily out of the exercise of his judicial authority, and should know that, until the business which justified his temporary retirement from the exercise of his functions had been dispatched, he was disqualified from holding his court. In the interim his judicial authority would be in suspension, so that, if objection had been made by the litigating parties, that authority could not have been exercised."

This decision appeals to our judgments as being sound in principle, and even if the provisions of our laws were as restrictive as those of Kansas are, we would follow it. But our Constitution, in section 179 (Bunn's Ed., p. 47, Const. art. 7, § 10), in express terms says: "Two or more district judges may sit in any district separately at the same time." From this it is clear that the regular judge, and as many special judges as may have been appointed or selected, may sit separately in the same district at the same time. So the grounds relied upon by the defendant, as showing want of jurisdiction in the special judge who tried this case, are without merit. While this court is required, by statute, to refer questions involving a construction of the Constitution of the state to the Supreme Court for decision, this provision of the Constitution is so plain and direct as not to admit of controversy. But, be that as it may, for the reasons given, this court holds that the powers of the special judge to try this case could not be abrogated or interfered with by anything that the regular judge may have done during the trial of this cause, even if such action had properly appeared in the record.

Fifth. Defendant complains of the action of the trial court in not granting his application for a change of venue. This application was regular in form, and was attested by the necessary number of corroborating witnesses. It was contested, and a number of counter affidavits were filed on behalf of the state. When it came on to be heard, the county attorney placed the following witnesses on the stand, all of whom had joined with defendant in his motion for a change of venue:

John Williams, who testified that he had lived in and near to Tecumseh off and on for four or five years, and that he was a farmer; that he was in Tecumseh the night that defendant was arrested; that he had gone to Shawnee since, and had also been out in the country near Shawnee, since, and also to Sewell, to a negro settlement; that while in Shawnee he had been around on the streets and among the colored people; that he had heard some colored people say that they would not give defendant a fair and impartial trial, and he had heard some white people say the same thing; that all that he heard to this effect was in Shawnee, Sewell, and Tecumseh. He was then asked this question: "Do you know anything about the feeling, generally, in this county, toward the defendant?" Answer: "No, only for myself." He testified that he thought that defendant could not get a fair and impartial trial on account of the prejudice of the people, and that he had heard a great many persons say so in the places where he had been, but did not know where these people lived. That he had heard this in passing people in the street, and supposed that they were talking about this case, but did not know it—they might have been talking about some other case. He also stated that he did not know whether this feeling had subsided or was still existing. On cross-examination he said that on the night of the arrest of defendant a mob came and tried to get defendant, and that defendant had been tried and sentenced to be hung; that these facts had been generally talked about around the county; that he knew this from what he had heard at the different places to which he had been; and that, in his opinion, defendant could not get a fair and impartial trial in Pottawatomie county. On re-direct examination, he testified that he had not seen anything since the mob came, which led him to believe that defendant could not get a fair and impartial trial in the county. The court then examined the witness, and he testified that he left Shawnee on the 10:30 interurban car on the night that defendant was arrested; that the car was full of people, and they were standing on the steps, and some were hanging on;

that no one offered any violence to him; that the passengers were from 15 years of age to 35. They said they were coming over to Tecumseh to get Will Johnson; that when they reached Tecumseh they went to the jail. He heard some one say, "Bring him out!" That in his judgment there were a hundred or more persons there.

The next witness was Pauline Hayden. She testified that she had lived in Tecumseh for four or five years; that she lived at the oil mill, and had not been out in the country or mixed with white people much. She was asked, "Then you don't know anything about the feeling generally, in the county, about this defendant?" and answered, "No, sir; I don't know anything about the feeling." Question: "You just think so?" Answer: "Yes, sir." She said that she did not see the mob, but heard of it, and that she thought this would create a feeling against him, but did not know any thing about it; that she had never heard any one so express themselves, but she believed it. On cross-examination she testified that she had heard that defendant had been taken out of the county to keep the mob from getting him; and had also heard that he had been tried, and sentenced to be hung; that she had heard the matter discussed by colored people, but had never heard it talked of by white people Examined by the court, the witness testified that she did not think that the white people would give a colored man a fair and impartial trial when he was charged with the killing of a white man, or woman, in the county where the offense was committed, but that they would do so in some other county.

Rebecca Williams testified that she lived in Tecumseh and had lived there since last Christmas; that she goes to Shawnee sometimes; that she had heard both colored and white people talk about this case in Tecumseh and Shawnee. She heard some white people say that defendant had killed Mrs. Cuppy, and she heard some say they did not know whether he did it or not. "I heard some say they did not think he could get his trial." She said that she did not know anything about how the people of the county felt about the defendant; and that she had heard of the former conviction, and sentence of defendant, and had heard people talking about these things, and had come to the conclusion that defendant could not get a fair and impartial trial in the county.

J. S. Brooks testified that for two years he had lived two miles south of Tecumseh, off and on, and also at Keokuk Falls since February; that he had heard people talking about this case on the streets of Tecumseh; that he knew nothing of how the people felt in the south or north end of the county. The witness stated that, in his opinion, a jury could not be obtained who had not formed an opinion. He also said: "Here is what I think about it: Of course, under this Constitution, we all voted for statehood, and from what I learned of it, we had an election, and we wasn't to have any hanging or execution. Of course, the law is in the hands of you men. This is how come me to sign this thing" (defendant's application for a change of venue). Then he was asked: "Why did you vote for that effect?" and answered, "My understanding was that there was not to be any hanging at all." The witness also testified that he had heard expressions on the street that defendant should be hung, and that the law was too slow in hanging him.

Earnest Amy testified that he lived southeast of Tecumseh; that he was in Tecumseh the night defendant was arrested; that he did not go around among the people but stayed at home, and that he knew nothing about the feeling of the people generally toward the defendant; and that he could not say whether the people could give defendant a fair trial or not. He had heard a lot of people say that defendant could not get a fair trial. Cross-examined, witness saw a mob formed; heard them say they would hang defendant if they could get him. He also heard the former trial, and knew the result. Thought defendant could not get a fair trial.

All of the above witnesses were corroborating witnesses of defendant in his application for a change of venue.

Defendant then offered the testimony of the examination of the jurors on *voir dire*. Defendant then called John Hatfield to support his application. The witness testified that he was a deputy sheriff, and had held this position for five years. He testified that a few people in Shawnee talked about forming a mob, and that some people came over to Tecumseh. Witness was in the jailyard, and was armed. The sheriff was in the yard, also. The defendant had been caried away from the jail by the sheriff; that with the school children taken out, the crowd around the jail would not amount to over 50 persons. No one drew a gun. One fellow got upon the fence, and witness pushed him off; that the men were from Shawnee and Tecumseh, and the immediate vicinity; that the defendant had been removed from the jail for about an hour before the crowd came; that the crowd appeared more curious than excited. Some were demanding admittance to the jail. The witness testified that he had been in every precinct of the county serving subpoenas, summonses, and so forth; that the witness had not seen or heard anything that would indicate that defendant could not get a fair and impartial trial in the county; that it was not true that the minds of the people of the county were prejudiced, and inflamed against defendant.

E. A. Price was called as a witness in behalf of defendant. He testified that he was sheriff of the county. Witness heard that there was danger of a mob, and had defendant conveyed to a place of safety. Witness further testified, "I was in the jail when about 70 persons marched up." That he carried several persons through the jail, and let them see that defendant was not there. Witness knew of defendant's conviction and sentence; that this had been published to some extent in the papers—had heard expressions that defendant ought to be hung. These expressions were freely made on the night of the homicide; that since that time he had not heard many people say so. On cross-examination the witness said that, from what he had heard and from what he knew of the sentiment of the people of the county, he did not think that there was such prejudice or bias existing in the county among the people as would prevent defendant from receiving a fair and impartial trial in the county. On re-direct examination, witness said that a jury could be secured in the county who had never heard of the case; that the persons who came to the jail the night of the homicide were from that immediate vicinity; that they were acting under excitement; and that a number of them had come to witness since, and begged his pardon for what they had done, saying that they had acted under excitement at the time.

Steve Gage was placed on the stand by the defendant. Witness testified that he saw the men at the jail the night of the homicide; that he had heard the testimony of the sheriff, and his testimony was correct; that he heard people say defendant ought to be hung; saw an account of the previous conviction of defendant in a newspaper; and that all that he had heard about the case was from people around town.

Mr. Day, a bystander, was placed on the witness stand by the state. He testified that he lived one mile north and four miles east of town; had met the people of the county at different places; there is no such prejudice existing among the people as would prevent defendant from getting a fair and impartial trial in the county. Cross-examined, the witness testified that he, at that time, had no opinion as to the guilt or innocence of defendant; that witness had heard friendly feelings expressed among the people toward defendant. Quite a number of them did not know whether he was guilty or not. A majority of the people do not think the defendant guilty.

L. M. Cummings, a bystander, called as a witness by the court, testified that he lived 18 miles northeast of Shawnee; was in town on business; had not come to attend the trial; that the case had not been discussed much in his neighborhood; had only heard two or three men speak of it; that the people of his section were not biased or prejudiced against defendant, and could give him a fair and impartial trial; witness had never heard of the previous conviction of defendant; had never heard either side of the case; lived at Belmont; was a merchant; was in position to know whether there was prejudice against defendant; that but little had been said about the case in his section; and the people there were not prejudiced against defendant.

J. W. Hatfield, a bystander, called by the state, testified that he lived at McLoud; was a merchant; comes in contact with a great many people; that the people of his section are not so prejudiced against defendant that they would not give him a fair and impartial trial. Cross-examined by defendant: Had seen the account of the previous trial of defendant published in the papers; cannot say that the verdict of the jury was approved by the people; had never heard any one express himself.

The foregoing is the substance of the entire testimony introduced, with reference to the change of venue. We have gone into it fully, as we regard this as the most serious question in the case. Our Constitution guarantees to every one who is charged with a crime a fair trial before an impartial jury. The presumption of law is that a defendant can get a fair and impartial trial in the county in which the offense was committed. In order to overcome this presumption, the defendant must show, clearly, that this cannot be done. The applicantion for a change of venue is addressed to the sound discretion of the trial judge. He sits both as judge and jury, and determines all questions of law and fact that arise upon the hearing of the motion. His decision is not subject to review by this court unless an abuse of this discretion is made to appear. In this case the state examined, as witnesses, all of the parties who joined with defendant in his application for a change of venue. From their testimony it was made to appear that the minds of the people of Shawnee, Tecumseh, Sewell, and Keokuk Falls were inflamed against defendant to greater or less extent; but no such showing was made as to the people of the other portions of the county. It also appeared that the means of knowledge of all these witnesses was limited to their immediate localities, and that much of their testimony consisted in the expressions of their individual opinions The United States census for 1907 shows that there was at that time, 11,007 male persons, over the age of 21 years, residing in

Pottawatomie county. We cannot hold that the trial judge abused his discretion in refusing to grant the change of venue on this testimony. It does not even make a *prima facie* case, so far as the people of the entire county are concerned.

The Supreme Court of Minnesota, in the case of *State v. Stokley,* 16 Minn. 253 (Gil. 249), lays down what we conceive to be the correct rule on this subject. It says:

"It has always been held that the inability to obtain a fair and impartial trial should be clearly established, and a *prima facie* case of undue feeling and excitement has been held insufficient, as easily established in most cases of crime, especially of a flagrant character."

After the corroborating witnesses of defendant were placed upon the stand, the defendant himself called the following witnesses in support of his application, viz.: John Hatfield, E. A. Pierce, and Steve Gage. By so doing, defendant made these parties his witnesses, and vouched to the court for their means of knowledge and credibility. Each of these witnesses testified that there was no such prejudice in the county against defendant as would prevent his having a fair and impartial trial. But this is not all. A number of bystanders, living in different sections of the county, were placed on the witness stand by the court, and they testified that there had been little discussion of the case in their sections, and that the people of the county were not prejudiced against defendant. We, therefore, cannot hold that the trial court erred in not granting defendant's motion for a change of venue.

Sixth. Defendant complains of the rulings of the trial court in the selection of the jury. Special objection is made to overruling the defendant's challenge to the juror J. P. Willis for implied bias. It appeared, upon the cross-examination of this juror, on his *voir dire,* that he had served on a jury in a capital case in another state, and that, as a result of the verdict of that jury, the defendant was dead. Defendant complains of the action of the trial court in not sustaining his challenge of the witness for implied bias. In support of this challenge, counsel cite paragraph 5 of section 5473 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, which provides that a challenge for implied bias may be made against a juror for "having served on a trial jury which has tried another person for the offense charged in the indictment." As counsel strenuously insist in their brief that it was reversible error for the court to overrule this challenge, we will call their attention to the fact that, if they are correct, it would disqualify every man from jury service in a murder case who had ever served on the jury in any other murder case. To our minds it is clear that the Legislature never intended to produce any such result. The evident purpose was to disqualify those persons from sitting as jurors in a case who had previously sat as jurors trying some other person for the same identical offense. The court, therefore, did not err in overruling the challenge made. But, let this be as it may, defendant cannot complain, because this juror was afterwards peremptorily challenged by defendant, and the record does not show that any incompetent juror was forced on defendant by virtue of his having been forced to exhaust a peremptory challenge upon the juror Willis. Error in overruling a proper challenge to a juror, only becomes ground for reversal when the defendant is forced to use one of his peremptory challenges on said juror, and the record shows that the defendant exhausted all of his peremptory challenges, and, that by reason of his having been forced to do this, an incompetent juror was forced upon him.

This question has been repeatedly before appellate courts. In *Hudson v. State,* 28 Tex. App. 323, 13 S. W. 388, the court **said:**

> "It was error to refuse to stand the juror aside; but the error becomes harmless in view of the fact that the juror did not sit upon the case, the defendant having rid himself of him by a peremptory challenge, and no objectionable juror having set upon the case."

The following Texas cases are to the same effect: *Holt v. State,* 9 Tex. App. 571; *Myers v. State,* 7 Tex. App. 653; *Grissom v. State,* 8 Tex. App. 386; *Hollis v. State,* 8 Tex. App.

620; *McKinney v. State,* 8 Tex. App. 626; *Cook v. State,* 8 Tex App. 659. As the Texas Court of Criminal Appeals is probably the greatest appellate criminal court in the world, we might well rest our decision of this question upon these authorities alone. We will, however, cite Thompson on Trials. In section 115, p 115, of volume 1, the author states that in some jurisdictions it is held that when a challenge for cause has been improperly overruled, and the defendant challenges the juror peremptorily, and exhausts all of his peremptory challenges on this account, there is room for the inference that the erroneous ruling may have resulted in having upon the panel other obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenges; and then says:

> "But others take what seems to be the better view, that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who otherwise would have been excluded by peremptory challenge."

In support of this doctrine the author then cites a great number of cases, which lay down the same rule.

Defendant further complains that his challenges for actual bias should have been sustained to the jurors Hall, Markim, and Leighton. The juror Hall had read a short sketch of the former trial in a newspaper, but formed no opinion, because he did not pay much attention to the matter, and because he had never heard what purported to be the facts of the case. If accepted as a juror he could, and would, give the defendant the benefit of the legal presumption of innocence, and would base his verdict as a juror solely upon the testimony of the witnesses and the law, as given the jury, in the instructions from the court. This is a fair sample of the testimony of the other jurors complained of. It is true that the trial court is not bound by the answers of a juror as to his bias or prejudice in the case, but may take such other steps as may be proper to ascertain the disposition of the juror towards the defendant. We see nothing in the statements of either of the jurors complained of which, of itself, would disqualify them to sit in this case. The trial court heard their testimony, and saw their demeanor and manner of testifying, and was in a much better position to judge as to the fairness and impartiality of the jurors than this court. Our statute upon this subject is:

> " Sec. 5475. In a challenge for implied bias, one or more of the causes stated in the second preceding section must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of the third preceding section, must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court."

But the enumerated causes of challenge in the statute are not exclusive of all others not enumerated. When the juror has any opinion as to the guilt of the defendant, it matters not how this opinion was formed, the closing paragraph of the statute provides that it must appear to the court that the juror can and will act fairly and impartially in the case. But if this provision was not in the statute, we would be forced to place this construction upon the first part of the statute, because section 29 of our Constitution (Bunn's Ed.) is in this language: "In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury." (Const. art. 2, § 20.) Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void. Although a juror may know absolutely nothing about the facts of the case, and may not have the slightest opinion as to the guilt of the defendant, yet if from any cause or upon any ground it appears to the trial court that the juror is biased or prejudiced against the defendant, it cannot be said that he would be a fair and impartial juror, and he should be excluded from the jury:

otherwise the Constitution of the state would be disregarded and trampled upon. The trial court should resolve all doubts upon this matter in favor of the defendant. Upon the other hand, when no personal, class, or race bias or prejudice appears to exist in the mind of the juror against the defendant, but it does appear that from rumor, or reading the public press, or from notoriety, the juror has an opinion as to the guilt of the defendant, but that such opinion will not combat the testimony or resist its force, and the court is satisfied that the juror can and will lay this opinion aside, and base his verdict alone upon the testimony of the witnesses and the instructions of the court, then the juror is competent. To our minds this is the only rational construction which can be placed upon our statute.

The case of *Bradford v. Territory of Oklahoma,* 2 Okla. 230, 37 Pac. 1062, is in harmony with these views. In that case Judge Burford said:

> "The first error assigned is the action of the judge of the trial court in sustaining the challenge of the relator to certain jurors for cause. The jurors testified, on their *voir dire,* that they had formed opinions as to the merits of the cause, based upon hearsay and newspaper reports, but that, notwithstanding such opinion, they could give the defendant a fair and impartial trial. The court excused the jurors named, and directed other jurors to be selected to take their places. It is contended that these jurors were not disqualified under section 5622, Criminal Procedure, St. 1890. It is provided by said statutes that: 'No person shall be disqualified as a juror by reason of having formed or expressed an opinion on the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals or common notoriety, provided it appears to the court upon his declaration, under oath or otherwise, that he can, and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him.' Under this section the court must be satisfied that the juror will act fairly and impartially, and in passing upon this question he must act judicially on the facts before him, and the conduct and appearance of the juror; his manner and apparent candor or impartiality are all to be considered by the court together with his action in determining his fitness as a juror. It is the duty of the trial court, in the selec-

tion of jurors for the trial of a cause, civil or criminal, to see that jurors are obtained who will act fairly and impartially between the litigants; who will not be influenced or biased by previously formed opinions, or actuated by motives other than a desire to render exact justice to both parties. A very large discretion is vested in the court in determining the competency and qualifications of jurors, and its actions should never be disturbed by an appellate court, unless an abuse of such discretion is clearly apparent. We find nothing in the record to indicate that the trial court abused the discretion vested in it in impaneling the jury. And while it would not have been error, under the statutes cited, to have retained the jurors, as appears from their answers, the presumptions are in favor of the correctness of the act of the trial court and no error is manifest in the record. In any event, the statute cited from criminal procedure cannot be held as controlling, yet the rule there stated is the proper one, now accepted by most all the courts of the highest resort, in cases either civil or criminal."

In the case of *Huntley v. Territory,* 7 Okla. 60, 54 Pac. 314; Judge Tarsney said:

"The formation or expression of an opinion by a juror, without regard to the character of the opinion, or howsoever formed, is not a legal disqualification. It is apparent that if every opinion, of whatsoever character, and howsoever formed—whether a mere passing inclination or settled conviction in the mind—is to work a disqualification of the juror, the difficulty of obtaining intelligent jurors will be greatly increased, if not rendered absolutely impossible. One accused of crime is, by the Constitution, guaranteed a fair and impartial trial; but to insure this it is not meant that the jurors trying the case shall never have heard of the case, or shall not have any impressions concerning any of the facts, or passing inclination. This guaranty in the Constitution only excludes from the jury box those who are possessed of an opinion, upon the merits of the case, upon the guilt or innocence of the accused of the charge laid in the indictment, upon the evidence substantially as expected to be presented for the consideration of the jury on the trial of the case, or an opinion indicative of ill will toward the accused. *State v. Clark,* 42 Vt. 629. Section 25 of article 9 of the Code of Criminal Procedure is called to our attention by the Attorney General, and provides as follows: 'No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him.' We are inclined to the view that this provision adds nothing to the effect of the provisions of section 22 of said article, previously quoted. If it were intended by this provision that no opinion held by a juror, however fixed and definite it might be, and though it might be indicative of ill will, should be a disqualification, if founded upon rumor, statements in public journals, or common notoriety, provided the juror should make declaration, under oath or otherwise, that, notwithstanding such opinion, he would act impartially and fairly upon the matter submitted to him, we would hesitate before saying that this statute might not be violative of the constitutional right of the accused to a trial by an unbiased jury. As we view it, the question presented in these cases is, not how, or from what sources of knowledge or information, the opinion was formed, but what is the character of the opinion, and whether it is such as to prevent the juror from determining the merits of the case unbiased by such opinion. The mere declaration of the juror, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly, cannot be made the test of his qualifications. It is 'the court, in the exercise of sound discretion,' that must determine whether the juror entertains a disqualifying opinion, and not the mere declaration of the juror himself. The formation and expression of an opinion is not alone the test of a juror's competency, but the nature of the opinion may be inquired into, and, if found to be only a transitory inclination of mind, it is not a disqualifying opinion. To work a disqualification, there must be an abiding bias of the mind, caused by substantial facts in the case, in the existence of which the juror believes; an opinion upon the merits of the case, upon the guilt or innocence of the accused of the charge laid in the indictment, upon the evidence substantially as expected to be presented on trial. Mr. Chief Justice Marshall, in *Burr's Trial* (1 Burr's Trial, 416, Fed. Cas. No. 14,693), states the rule to be that: 'Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror, but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them—which will combat that testimony, and resist its force—do constitute a sufficient objection to him.' The question presented by such challenge is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence; and the trial judge must, in the exercise of a sound discretion, be satisfied from the evidence that the juror cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, or the challenge should be overruled. *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244; *State v. Meaker,* 54 Vt. 112; *Scranton v. Stewart,* 52 Ind. 68; *Balbo v. People,* 80 N. Y. 484; *Cox v. People,* 80 N. Y. 500; *Baldwin v. State,* 12 Mo. 223; *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420; *People v Welch,* 49 Cal. 174; *State v. Lawrence,* 38 Iowa, 51. In *Reynolds v. U. S., supra,* Mr. Chief Justice Waite, speaking for the court, says: "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of facts raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for a new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial.' "

The question of the competency of jurors is addressed to the sound discretion of the trial court, and, in the absence of an abuse of that discretion, it is not subject to review. In other words, while the trial court must be clearly satisfied that a juror is fair and impartial before permitting him to sit in a criminal case, yet, upon appeal to this court, it must be clearly shown that the trial court abused its discretion before this court will review its rulings in this respect. We have carefully read the entire record of the examination of the jurymen summoned in this case, upon their *voir dire,* and fail to find a single instance in which the trial court ruled improperly against defendant. On the contrary, the record shows the most constant and vigilant care on the part of the court in this respect. The great majority of the jurors to whom the trial court sustained challenges for actual bias, upon the face of the record, appear to have been competent to sit in the case. If error in this respect was committed, it was at the instance of defendant, and against the protest of the state. Therefore defendant cannot be heard to complain. But the trial court saw the jurors, and their manner of testifying, and was in a better position to pass upon this question than this court is.

In view of the importance of this case, and of the further fact that the record shows that in some localities in the county there was more or less prejudice against the defendant, we desire to commend the constant, vigilant care which was exercised by the trial court in seeing that no improper juror sat in this case. It is the duty of the trial court to resolve all doubts as to the competency of a juror in favor of the defendant, which was clearly done in this case.

Seventh. Counsel for defendant complain that the court erred in permitting incompetent, irrelevant, and immaterial evidence to be given to the jury on behalf of the state, which was prejudicial to the substantial rights of the defendant, and was duly excepted to by the defendant. But, in the presentation of this ground for reversal, they failed to point out specifically the objectionable evidence. This general complaint of the action of the court in the admission of alleged incompetent evidence is altogether insufficient to present any such alleged errors in this court for consideration. But in view of the importance of this case, and because our system of criminal jurisprudence is yet in a formative condition, we have carefully read the record over to see if any improper evidence was admitted. We have not found any ground to support the contention of defendant. On the contrary, we find that the trial judge exercised the widest latitude in behalf of defendant in this matter, and excluded evidence offered by the state, upon the objection of counsel for defendant, which should have been admitted. The state's witness, Mrs. Hinkle, testified that the deceased came from the direction where the assault had been made upon her; that she was covered from head to foot with blood; that she looked back in the direction from which she came; that she fell down, and got up and entered the yard of the witness, and sat on her porch; that this was a little after 9 o'clock in the morning; that the witness went up and had a conversation with deceased; that the blood was still flowing from wounds on her head. The witness was then asked what Mrs. Cuppy said. To this counsel for defendant objected, upon the general ground that it was incompetent, etc. The court sustained the objection. It appeared from other testimony that this was only a few minutes after Mrs. Cuppy had received the injuries which caused her death. She was then evidently fleeing from the place where the wounds had been inflicted upon her. Any statements which she may have made as to how the injuries were inflicted, and as to who inflicted them, should have been admitted as a part of the *res gestae;* and in excluding such statements the trial judge erred. But as this was done at the instance of counsel for defendant, and as it was to his benefit, he cannot be heard to complain.

Eighth. Counsel for defendant complains that the court misdirected the jury as to the matters of law; but they did not point out in what particular this was done. A general complaint is not sufficient. Were this not a capital conviction, we would dismiss this complaint without further remark; but being a capital case, we have gone over the instructions given, and we fail to find a single paragraph which does not fairly state the law applicable to the case.

Ninth. Defendant complains of the action of the trial court in not requiring the jury to return a verdict either for the state or for the defendant, upon his plea of former jeopardy. It is not necessary for this court to pass upon this question. We have held in this case that a new trial was properly granted This wiped out the former conviction, and the case stood as if it had not been previously tried. The plea of former jeopardy did not, therefore, present a defense to a second trial of defendant for this offense. It presented no issue of fact for the determination of the jury, and should have been stricken out by the court. The defendant might, with equal propriety, have requested that the action of the trial court in granting him a new trial, or that his motion to quash the indictment, or his motion for a change of judge, or his motion for a change of venue, or his motion for a continuance, should each and all have been submitted to the jury, they all presented questions of law, and were therefore for the court alone. If the plea of former jeopardy in this case had been good, upon its face, then the court should have submitted the matters of fact involved to the jury. But the plea is wholly insufficient as to matters of law, and there was therefore no question of fact for the jury. The contention of counsel for plaintiff in error is without support in reason, and is directly contrary to our statute. Section 5556, Wilson's Rev. & Ann. St. Okla. 1903, is as follows:

> "A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment."

This statute was taken from the California Code. The question we are now considering came before the Supreme Court of that state in the case of *People v. Gilmore,* 4 Cal. 376, 60 Am. Dec. 620, and the court held that when a defendant had been indicted for murder and convicted of manslaughter, and a new trial, for error, was granted, he could not plead former jeopardy, on account of such conviction, upon a second trial for the offense of manslaughter; but that he might plead former acquittal of murder, as the verdict of conviction of manslaughter was an acquittal of murder. This is followed by all subsequent cases in court.

Tenth. Defendant contends that the verdict is not supported by the testimony. This requires a consideration of the evidence in the case.

Mrs. Alexander was the first witness for the state. She testified that about 9 o'clock of the morning of the 23rd day of February, 1908, she saw the deceased pass her house on the public road, walking slowly, going west, and that the defendant was about 50 yards behind her, walking rapidly in the same direction; that this was about 300 yards from the place where the deceased was assaulted, and that both parties were going in that direction. This was the last seen of either party before the assault was committed. G. W. Cuppy, the next witness, identified a map, or plat of the section of the country where the assault was committed. Mrs. Heinkle testified that, a little after 9 o'clock in the morning of the assault, the deceased came to her house, covered with blood from her head to her feet; that there were wounds on her head. John Keys testified that he knew defendant; that he saw him at the home of the witness, which was near the place of the assault, eating breakfast, on the morning of the 23rd of February, 1908; that defendant was in the employment of witness. Witness identified a pair of boots as the boots of defendant; also a cap and a coat of defendant, which were introduced in evidence; also an ax handle which looked like one which had been lying around the yard of witness. Witness knew that defendant left the house of witness about 9 o'clock that morning, and, if he returned, witness did not see him. That witness was at his home when the assault was made on deceased. Dr. J. A. Walker testified that he was called to see the deceased on the morning of the 23rd of February, 1908, about 10:30 o'clock, and found her suffering from wounds on her head, some of which were made by a blunt instrument; and also there were cuts upon her head, apparently made with a hard edged instrument; that she died from the effect of these wounds. Dr. T. E. Evans testified substantially the same as Dr. Walker. W. E. Sims testified that he was chief of police of the city of Shawnee; that on the morning of the assault made on deceased, and very soon thereafter, he went to the place of the assault; the ground was all torn up, as if there had been a struggle there, and the bushes on the side of the road were covered with blood. The ground indicated that some one had been dragged from the road. There was a club there, covered with blood. Witness identified the boots offered in evidence; he first saw them on the feet of defendant. They had mud, blood, and hair on them. One of the boots was run down. Witness saw tracks in the soft places, where the assault was made on deceased. The boots of defendant fitted these tracks. These tracks led from the place of the assault to the house where defendant lived. Witness identified a pair of overalls which defendant was wearing soon after the assault. They had fresh blood on them. Jim Pierce, a deputy sheriff, testified that he arrested defendant on the morning of the assault, in a field near the place where the assault was made, and that there was fresh blood on his nose, and eyebrows, and hair. Called the attention of defendant to the blood, and he said that he had hurt his nose in the barn that morning, and had wiped his nose and eyes with his handkerchief. His handkerchief was examined, and there was no blood on it. He asked defendant, "What did you do it for? Did you want to rob her?" He replied, "Captain, I never got a penny." The question was repeated, and the reply was, "I never got any money from her." Witness then said, "Well, if she says you are the man, she is mistaken." Defendant replied. "If she says so, I could not dispute her word." Defendant also told witness that he had been at the house all of the morning until he came to the place where he was arrested. L. A. Brown testified: Went to the place of the assault soon after the assault took place. It was all torn up; some one had been dragged from the public road down by a culvert; there was blood there, and tracks. "Defendant had blood on his face when I saw him, and there was fresh blood all over the face of the overalls he had on, and looked soft as though it had been there only a few minutes." Defendant was taken to the place of assault and put his foot in seven or eight of the tracks there, and they fit. One of his boots was run down. The tracks led from the place of the assault to the house where defendant lived. Witness saw blood on the boots of defendant. There was also blood around his finger nails. Clifford Abbott testified to finding the mittens and pocketbook of deceased near the place where the assault was made on her. Mrs. Abbott testified: Mrs. Cuppy died on the 24th day of March; described wounds of deceased. Mrs. Loyd described condition and wounds of deceased. Mr. Harrison testified that he visited the place where deceased was assaulted, soon after; saw a broken ax handle, and indications of a scuffle there; of a body and head in the ground, and a pool of blood. Was there when defendant was brought to the place by the officer; saw fresh blood on the face and boots of defendant. Defendant said the blood on his face was on account of his hurting his nose, and the other blood on his clothes was from butchering a hog a few days before. Witness had had 25 years' experience in killing hogs. It would not have been possible for the blood on defendant's boots to have been there for two or three days, and have been in the condition it was in. The blood on his boots was fresh, and had no dirt on it. It could not have been there more than one or two hours. Mr. J. E. Abbott went to the place of the assault on the 23rd day of February, and found near there a black fascinator, which belonged to the deceased. It was soaked with blood; also found a club near there. E. A. Pierce, sheriff, went to the place of the assault about 11 o'clock on the morning that it occurred; saw deceased; she was very bloody; described place of assault as others had done. G. W. Cuppy, testified as to the condition of deceased after the assault.

State rested.

Defendant introduced, without objection, the record of former trial. Defendant testified: Was carried to place of assault; placed his foot in tracks; some of them fit his foot; some did not. Had never been to this place before. Had never seen deceased until after assault was made. Did not make the assault on deceased. That the cap and coat in evidence belonged to John Keys. Had never seen or handled a piece of wood introduced in evidence. Had on the overalls, in evidence, on Saturday before assault when he assisted in killing a hog on John Key's place. Had on boots, in evidence, when arrested. Officers took them off. Witness identified hair on boots, but did not know how it came there. On the first trial, entered the plea of guilty to the charge now pending; entered this plea because he was not ready for trial, on advice of his attorney and Mr. Merrill the jailer; thought it would save his life, but was not guilty.

Defendant rested.

John Keys, in rebuttal, testified: That no hog was killed on his place on Saturday before the assault. Some days before this Saturday, the brother of the witness, assisted by two boys, butchered a hog on the place of witness. Defendant took no part in it, and was not present, but was hauling wood. He (defendant) lived on the place, and was in the employment of witness.

Joe Keys testified: Cap and coat in evidence belonged to defendant. Killed a hog on John Key's place the day before he went to McLoud. This was before assault. Defendant did not assist and was not there; but was hauling wood. No one assisted who had on boots or clothing of defendant.

Venue and a number of other minor details were proved, but the above is a brief statement of the material testimony of the case, which, in our judgment, fully sustains the verdict arrived at by the jury. We do not believe that an intelligent and honest jury could be found in the state, who, with a due regard for their oaths and the testimony, could reach any other conclusion than that defendant was guilty of a most cowardly, cold-blooded, and brutal assassination of an inoffensive old woman. The punishment inflicted by the jury is the extreme penalty of the law, but the crime committed was of appalling atrocity, and fully justified the verdict. Laws are made to be obeyed. Punishments are prescribed to be inflicted for the purpose of setting an example which will deter others from committing similar offenses. The law does not punish as a matter of revenge; the purpose of punishment is the protection of society. The duty of this court ends when it finds that a defendant has been found guilty upon a fair trial before an impartial jury. Under these conditions we have no further duty, painful though it is, than to sustain the verdicts of the juries and the judgments of the courts.

After a patient investigation of the record, we find that no errors were committed prejudicial to plaintiff in error, and the judgment is in all things affirmed.

BAKER and DOYLE, JUDGES, concur.

On Rehearing.

PER CURIAM. Rule IX. of this court, governing petitions for rehearing, is as follows:

> "IX. Application for a rehearing in any cause, unless otherwise ordered by the court, shall be made by petition to the court, signed by counsel and filed with the clerk within fifteen days from the date on which the opinion in the cause is filed. Such petition shall briefly state the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court, and the question, statute or decision so overlooked must be distinctly and particularly set forth in the petition. No oral argument will be allowed on an application for a rehearing, except upon direction of the court, but if such application is granted, the cause shall be assigned for rehearing, and the clerk shall notify both parties or their counsel of the time when such rehearing will be had, and such time may be given for argument or brief as the court shall allow."

The petition for a rehearing in this case is largely a restatement of the grounds relied upon by counsel for the defendant in his assignment of errors. To this extent we will not consider the matters thus presented, as we gave these questions the most careful and painstaking consideration when they were first submitted.

Counsel for the defendant are mistaken in stating that this court has decided, in this case, that a defendant must set out in his motion for a new trial the improper evidence admitted, and give the names of the witnesses, where evidence is complained of; and must set out, in his motion for a new trial, the specific instructions given by the trial court complained of. We believe that this would be the better practice, but we have not announced any such doctrine as applicable to the preparation of motions for new trials. In order to make this matter so plain that no one can misunderstand it, we now declare that what was said in the opinion upon this subject was limited exclusively to the presentation of such questions in this court, as ground for reversal. In this case counsel for defendant did not, in their brief or oral arguments, point out to this court a single specific error in the ruling of the trial court upon these questions. It was to this deficiency that the court was calling attention. We now repeat that general objections of this character, in this court, will not be considered unless, as was done in this case, the court, of its own motion, examines the record in detail. In considering this case, this court spent several days in trying to find out what counsel was objecting to. This labor was increased from the fact that there is no index to the record which covers 810 pages. It is the duty of counsel to have their records properly indexed, and then to point out to this court the specific errors complained of. If it is not sufficient to allege in general terms that there is error in the record, and then expect the court to find it if possible. It might as well be understood at the beginning that this court will presume that proceedings in courts of record are regular, and that the party who assails this regularity must point out clearly the specific irregularity complained of. In other words, when attorneys come before this court and seek a reversal they must be able to place their fingers upon the place that hurts. A reading of the opinion rendered will show that this court did not overlook any of the opinions of the Supreme Court of Oklahoma

Territory, but that the cases referred to in the petition for a rehearing were cited, and discussed, and distinguished from the case at bar.

Counsel are in error in stating, in their petition for a rehearing, that this court has held that the evidence in support of their plea of former jeopardy should have been stricken from the record. This court held that their plea upon its face did not present the question of former jeopardy, and that the plea, not the evidence, should have been stricken from the record, and as to the correctness of this conclusion we have no doubt.

Counsel challenge the jurisdiction of the Criminal Court of Appeals to determine this case, upon the ground that before the creation of the Criminal Court of Appeals this case had been carried by writ of error to the Supreme Court. This contention is fully answered by section 170 (Bunn's Ed.) of the Constitution, which is as follows:

> "The appellate jurisdiction of the Supreme Court shall be co-extensive with the state, and shall extend to all civil cases at law, and in equity, and to all criminal cases, until a Criminal Court of Appeals, with exclusive appellate jurisdiction in criminal cases shall be established by law." (Const. art. 7, § 2.)

When the Criminal Court of Appeals was established by the Legislature, then the appellate jurisdiction of the Supreme Court in criminal cases ceased. That court then had no power to make any order in a criminal case then pending before it on appeal, except to transfer it to the Criminal Court of Appeals, as provided by law. In transferring this case, with all other criminal cases upon its docket, to this court, the Supreme Court practically held that it had lost jurisdiction of these cases, and that all appellate jurisdiction in such cases was vested exclusively in this court. This matter is too plain for argument. The statement of these things amounts to the demonstration of the jurisdiction of this court.

We are not unmindful of the awful conditions which surrounded this defendant. We do not blame his counsel for doing all in their power to save him from the consequences of his crime.

The fact that they have not been able to do so is in no manner their fault, but we could not disturb the verdict and judgment in this case without doing great violence to the laws of the state, and committing a crime against society.

Petition for rehearing denied.

WILLIAM P. PRICE v. STATE.

No. 2053. Okla. T. Opinion Filed November 19, 1908.

(98 Pac. 447.)

1. **APPEAL—Objections to Evidence—Definiteness.** Objections to the admissibility of evidence must at least be as definite as is required by Act 1905 (Laws 1905, p. 327, c. 27, art. 7. sec. 2), or they will not be considered by this court.

2. **EVIDENCE—"Res Gestae"—Declarations.** (a) Declarations, to be a part of the **res gestae**, need not be precisely coincident in point of time with the principal fact. If they spring out of it, shed light upon and tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberation and fabrication, then they are to be regarded as contemporaneous, and are admissible as evidence.

   (b) See facts in opinion that were properly admitted as part of the **res gestae**.

   (c) See opinion for reasons for admitting spontaneous exclamations as a part of the **res gestae**, and showing why they should not be treated as hearsay evidence.

3. **APPEAL—Review—Record of Excluded Evidence—Evidence—Admissibility—Homicide Threats.** (a) Where an objection to a question is sustained, and it is desired to preserve the matter for review in this court, the facts expected to be proven by the witness, in answer to the question excluded, should be incorporated in the record, so that this court can determine as to whether material and legal evidence has been excluded.

   (b) When threats are relied upon as part of the ground for reasonable apprehension of danger, it is proper to admit any evidence which will tend to show the true character of the threats so made, and which tends to add weight to or detract from them.

4. **WITNESSES—Credibility—Evidence to Affect — Admissibility.** It is error on cross-examination, for the purpose of affecting the credibility of a witness, to ask as to whom he married, for the purpose of showing that he had married a woman with whom he had committed adultery.

5. **HOMICIDE—Evidence—Admissibility—Giving Weight to Threats—Motive by Decedent.** When there was evidence of threats to kill the defendant, and that deceased had fired the first shot in the fatal

Syllabus.

difficulty, it was error to refuse to allow the defendant to prove that the deceased was under indictment for arson for burning a barn of the defendant, and that defendant was a witness against deceased on the charge of arson. This evidence was admissible, upon the ground that it tended to show motive on the part of deceased to kill defendant, and the further ground that it gave additional weight to the threats made, as ground of reasonable apprehension of danger, on the part of defendant.

6. **EVIDENCE—Declarations of Conspirators—Furtherance of Common Design.** Where there is the least degree of acting together between two or more parties in the perpetration of an unlawful act, the threats or declarations of one, in furtherance of the common design, are admissible against all of his associates, although made in the absence of the others.

7. **EVIDENCE—Conclusion of Defendant—Res Gestae—Statements of Defendant.** (a) See opinion for statement of facts, under which the defendant should have been permitted to state what conclusion he arrived at with reference to the acts and intentions of the deceased and those acting with him.

(b) Statements made by a defendant, which constitute a part of the **res gestae**, are just as admissible in his favor as **res gestae** statements of the deceased are admissible against a defendant.

8. **TRIAL—Instructions—Reasonable Doubt—Repetitions—Argumentative Instructions.** (a) It is error to instruct a jury that the words "reasonable doubt" "mean a doubt for which the jury can give a reason."

(b) It is error, by constant repetitions, to give to even a correct instruction undue prominence in the minds of the jurors. Such instructions are, in effect, a charge on the credibility of the witnesses and the weight of the evidence.

(c) It is error to instruct a jury as to the law in an argumentative manner.

9. **HOMICIDE—Instructions—Self Defense—Construction as a Whole—Contradictory Instructions.** (a) It is error to instruct the jury that "it must be apparent from the evidence that the circumstances and surroundings of the defendant, at the time of the homicide, were such as to cause in him a reasonable belief, founded upon reasonable evidence that he was in danger of death or great bodily harm at the hands of the deceased," before his right of self-defense would arise. The jury are not required to find him innocent, but must acquit, unless his guilt is proven beyond all reasonable doubt.

(b) In a murder case, the jury should be affirmatively, clearly, and distinctively instructed that they must determine, from the defendant's standpoint, the question of his guilt or innocence, and as the facts and circumstances in evidence reasonably appeared to him at the time of the homicide.

(c) Instructions to juries should be considered as a whole, and when so considered, and they harmonize with each other, and present the law of the case fully and fairly, they are sufficient.

(d) Where there is a correct instruction upon a material question in a case, and in another portion of the instructions there is an incorrect statement of the law upon the same question, it cannot be said that the law has been clearly and fully given to the jury, and reversible error has been committed.

10 **HOMICIDE—Negative Instructions—Threats.** When threats, in connection with reasonable appearance of danger, are relied upon, the court should clearly and affirmatively instruct the jury as to the bearing of threats upon reasonable appearances of danger. A negative instruction upon this matter is insufficient.
(Syllabus by the Court.)

Appeal from Roger Mills County; C. F. Irwin, Judge.

William P. Price was convicted of manslaughter in the second degree and appealed. Reversed and remanded.

On the 5th day of May, 1904, the grand jury of Roger Mills county returned an indictment against Wm. P. Price (hereafter called defendant), in which defendant was charged with the murder of James Yandell, on the 18th day September, 1903. On the 18th day of September, 1906, the trial began, and on the 22nd of September the jury returned a verdict of guilty of manslaughter in the second degree against the defendant. Motions for a new trial and in arrest of judgment were filed. and overruled. The court, on the verdict of the jury, sentenced the defendant to four years' confinement in the penitentiary at Lansing, Kan. The defendant then brought this case by appeal to the Supreme Court of Oklahoma Territory. Upon the admission of Oklahoma into the Union, under the provisions of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) and the Constitution of the state (Const. Schedule, § 27; Bunn's Ed. § 476) this case was transferred to the Supreme Court of the state. Upon the creation of the Criminal Court of Appeals, as directed by law, this case was transferred by the Supreme Court to this court.

S. B. Garrett, A. R. Garrett, J. W. Johnson, D. B. Welty and *John B. Harrison,* for appellant.—

On the question of erroneous instruction on right of self-defense: Vol. 5 pp. 33, 34 and notes, A.& E. Ency. of Law; *People v. Elliott,* (Cal.) 22 Pac. 207; *Phillips v. State,* 26 Tex. App. 228;

State v. Patterson, 45 Vt. 308; *State v. Donahoe,* 78 Iowa, 486; *Mahaffey v. Territory,* 11 Okla. 213; *Kirk v. Territory,* 10 Okla. 46, 60 Pac. 797; *State v. Hatch,* 57 Kan. 420, 46 Pac. 708; *People v. Hecker,* 109 Cal. 451; *State v. Reed,* 53 Kan. 767, 37 Pac. 174; *State v. Howard,* 14 Kan. 175; Vol. 25 A. & E. Ency. Law, 259.

On question of statements of deceased being admissible as *res gestae*: *People v. Wong,* (Cal.) 30 Pac. 1115; Underhill on Criminal Evidence, sec. 94, p. 118 *et seq.*; *Mayes v. State,* 64 Miss. 329; 60 Am. Rep. 58.

W. O. Cromwell, J. H. Cline, and *W. C. Reeves,* Assistant Attorney General, for the state.—

On the question of admissibility of deceased's statements as *res gestae*: *Johnson v. State* (   ) 58 Pac. 761-763; *Lewis v. State,* 15 S. W. 642 (Tex.); *State v. Hudspeth,* 60 S. W. 136 (Mo.); *Davids v. People,* 61 N. E. 537 (Ill..).

On the question of proper cross-examination to discredit witness: *United States v. Wood,* 4 Dak. 455; *State v. Raven,* 115 Mo. 419. *Helm v. Commonwealth,* 81 S. W. 270.

FURMAN, PRESIDING JUDGE. (after stating the facts as above). We will consider the assignment of errors in the order in which the matters complained of arise during the trial, and will state only so much of the testimony as is necessary to a proper understanding of the legal questions involved. As this case will be remanded for a new trial, we do not deem it necessary to state the evidence in full.

First. Defendant complains of the action of the trial court in overruling an objection made by his counsel to a question propounded by the prosecution, in its direct examination of the witness A. D. Jones. This witness had testified at some length to the facts leading up to the fatal difficulty. It appears among other things, that the witness and the defendant had gone into a saloon, at the request of the witness, to get some beer; that a man named Parks and James Yandell, the deceased, came into the saloon, also, and went up to the counter. It was in evidence that bad blood existed between these parties and the defendant, and that threats had been made by Parks and the deceased against defendant. Parks stepped up to the bar, and took some change out of his pocket, and slammed it down on the counter pretty hard, and said: "By God, give us something to drink!" Defendant was standing at the bar with witness. In the language of the witness:

"Mr. Price [defendant] shrunk back and away, and then is when I noticed Walter Price [a son of defendant]. He stepped between Mr. Price and the bar. He told his father he was there, and he would—what he meant was that he would attend to any trouble that might come up, and for him to keep out of trouble. * * * The first thing I knew a gun went off, and Walter Price reeled against me, and said he was shot."

The witness was then asked this question:

"Walter's remark was addressed to his father wasn't it? A. Yes, sir. Q. and in substance was telling him not to get into any trouble, and if there was any trouble coming up, he (Walter) was there to attend to it? (By Mr. Garrett: Objected to. By the court: Overruled. Exceptions.) A. Yes, sir."

This is an exact copy of the record touching this matter.

Section 2 of an act relating to practice and procedure in the district courts (Sess. Laws Okla. T. 1905, p. 327 c. 27, art. 7) is as follows:

"Sec. 2. That section 332, article 16, chapter 66 being general section 5430, Wilson's Revised and Annotated Statutes of Oklahoma, 1903, be and the same is hereby amended to read as follows: 'Section 332. An oral examination is an examination in the presence of the jury or tribunal which is to decide the facts or act upon it. The testimony being heard by the jury or tribunal from the lips of the witness . Where any party desires to object to any question put to the witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objections of incompetency, irrelevancy or immateriality, shall be deemed to cover all matters ordinarily embraced within such objection and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question becomes so objectional, but the court or opposing counsel may inquire of the objector wherein the question is so objectionable and the objector shall thereupon state specifically his reasons or grounds for such objections.' "

Whatever this court may think upon this subject, we are bound by the statute above quoted. It will be seen that the counsel for defendant simply said: "Objected to." This does not comply with the statute, and therefore does not amount to any objection. The better, and the safer practice is to point out the specific objection relied upon. But the objection must at least go as far as the statute provides; otherwise it cannot be considered by this court. We are not willing to relax the rules relating to objections to evidence any further than the statutes require us to do. So we will not consider this matter, holding that no legal objection was made.

Second. Defendant complains of the action of the trial court in admitting, over his objection, the evidence of Charles Boren. The record touching this matter is as follows: The witness testified that he was in the store of the witness, in the town of Sayre, when the shooting occurred; that within a minute or three-quarters of a minute thereafter, witness went into a back room of the saloon, where the shooting had occurred, and found the deceased. The record then proceeds:

"Q. Did he know you? A. Yes, sir. Q. What was his position? A. He was lying with his shoulders against the north end of the house, and his hip was against the screen door. He was laying on his right side. Q. Was the screen door shut? A. Yes, sir. Q. Did you talk to him any? A. Yes; I talked to him some. Q. I wish that you would detail the conversation; what you said, and what he said. (Objected to, as no foundation was laid for statement in the nature of a declaration. By the Court: Overruled. It is a part of the *res gestae.* Half minute. Defendant excepts.) A. I think I remarked, 'What is the matter with you, Hood?' [The evidence showed that the deceased was sometimes called Hood.] And he said, 'I think I am killed,' and I said, 'I guess not; I hope not'—and he said 'I wish you would send for my folks,' and I said, 'all right,' and then he said to me, 'Say, Charley, do you know what the old man shot me for?' and I said, No; I don't. Was you having any trouble with him?' And he said, No, but the other boys were.' "

As the evidence was admitted solely upon the ground that it was part of the *res gestae,* it is not necessary to discuss the law of dying declarations. We therefore withhold any expression of opinion upon that question. The defendant insists that the evidence was not *res gestae* because the statement of the deceased was not made until after the defendant had left the place of the difficulty, and after the deceased had had a conversation with Frank Brewer. The record shows that, immediately after tne shooting, the witness Brewer went into the room where the deceased was, and the conversation was held as follows:

> "Q. Did you speak to Mr. Yandell when you went back there? A. Yes, sir. Q. What, if anything, was said by him? A. I asked him if he was bad hurt. I don't remember what reply he made, but he could not get up, and I helped him over so he could sit up against the wall, and I noticed that blood was running out of him, and I saw that he was hurt."

As to what constitutes *res gestae* is possibly the most complex and difficult question in criminal law. As far as our investigation has gone, no appellate court has attempted to give a definition of *res gestae* which was intended to cover the entire question. At best courts can only deal with it in the light of the facts of each particular case in which it arises. The result is that great conflict exists in the opinions of the courts as to what evidence is admissable as a part of the *res gestae*. The more the question is investigated, the more apparent it becomes that it is impossible to harmonize and reconcile these conflicting opinions with each other. Any such attempt would be certain to end in defeat and in despair. The best that this court can do is to give the general principles, which we believe to be founded upon justice and supported by reason, which are applicable to the facts of the individual case before us. Our concern is to get as near as possible at the truth and foundation principles of the matter. It is our duty to give to Oklahoma, as far as we can, a just and harmonious system of criminal jurisprudence, which will aid in the administration of justice, and thereby assist trial courts in the discovery of the truth and the enforcement of law. It is our purpose to decide all legal questions in the light of reason and the moral atmosphere which surrounds them. It will not be denied that, where an act is done which is material to be understood, whatever may be said at the time, and which explains the purpose with which the act is done is a part of the thing then being done. Therefore to admit such statements in evidence is not in violation of the rule forbidding the introduction of hearsay evidence. Such statements are original evidence, and are classed as verbal acts. There is no substantial conflict in the authorities upon this question.

The conflict begins when it is attempted to introduce statements which are not identical, in point of time, with the act which they are claimed to explain. The authorities all agree that the statements, to be admissable, must be contemporaneous with the act done, and well calculated to unfold the nature and quality of the main fact in issue, and so to harmonize with it as obviously to constitute one transaction. The rock upon which the courts divide is as to the meaning of the word "contemporaneous." Many authorities limit the meaning of this word to identity of time and place, while the great majority go further and extend it to statements which grow out of, and are directly connected with, the act, although they precede or follow it. Action, without thought, is imbecility of mind, and cannot therefore be either meritorious or criminal. It is true that men often act upon impulse, but this impulse is the result of previous thought which has caused a mental condition. There must be a Union of both action and intention to constitute a felony. Any amount of action without intention is not felonious, and any amount of intention without action is also not felonious. Both of these elements are indispensible in cases of felonies. One and the same act may be either criminal or praisworthy, according to the intention with which it is done. By way of illustration: Suppose that at midnight A., with an incendiary purpose, applies a torch to the house of B., in the city, and destroys it by fire. He is a criminal of the blackest hue. Suppose that a great conflagration is raging in the city, and A., being in charge of the fire department of the city, at the same hour applies a torch to the house of B., and destroys it by fire (which is often done), for the purpose of burning ahead of the fire and thus checking the force of the conflagration; his act is legal, and free from blame. So, in the trial of a criminal case, it is the intention which gives character to the act and makes it either justifiable or a violation of the law. Now we cannot look into the minds and hearts of men and see what their intentions are. We can only determine their intentions by considering all of the facts which are connected with the matter under investigation, whether they precede, occur at the identical time, or follow the main fact, and which shed light upon the main act done. These facts constitute the *res gestae*. So what is said by the participants in a difficulty, with reference to the actions of either party, if contemporaneous with the acts done, and which grow out of and throw light upon what is done, is admissible in evidence as a part of the *res gestae*, and goes to the jury for what it is worth. The court simply passes upon the admissibility of the evidence. The jury are the judges as to its weight and credibility.

We approve what was said upon this subject by the Supreme Court of California in the *Vernon Case*, 35 Cal. 50, 95 Am. Dec. 49, which is as follows:

"It appears from the evidence, as presented in the record, that a witness, Dainty, resided about 200 feet from the residence of the prisoner. That deceased called at witness' house on Friday evening, the 21st of December, between 10 and 11 o'clock, and requested him to go with deceased to the house of prisoner for the purpose of amicably arranging a recent difficulty between prisoner and deceased. Dainty told deceased to wait till he put on his clothes, and he would go along, to which deceased replied that he would go along and see prisoner if he was up. and if he was in bed, he would call him up, and witness could come along. Witness dressed himself and started, had passed about half the length of his porch when he heard a shot, continued to advance towards prisoner's house, and immediately heard three more shots in quick succession, and when he got about halfway to prisoner's house met deceased walking fast from the direction of prisoner's house. That it was about half a minute and not exceeding three-quarters of a minute from the time witness heard the first shot till he met deceased, who immediately said he had been shot treacherously by defendant. That he (deceased) was sitting down on defendant's porch. That defendant came out to the door and spoke to him, and said, 'Wait till I go and put my boots on,' and instead of going to put his boots on, he came out with a gun and shot him when he was sitting on the porch. That when he (deceased) got up to go away, defendant followed after and shot him in the back. The objection to these declarations of deceased being given in evidence is urged upon the ground that they were not made at the very time of the shooting, but after the shooting had been concluded. That these declarations were made under such circumstances, and in such connection with the main fact, as to allow them to be given in evidence as part of the *res gestae* we have no doubt, and no error was committed in admitting them as such. Declarations, to be a part of the *res gestae,* are not required to be precisely concurrent in point of time with the principle fact. If they spring out of the principle transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and are admissible. 1 Greenl. Ev. § 108; *Mitchum v. State of Georgia,* 11 Ga. 615; *Commonwealth v. McPike,* 3 Cush. (Mass.) 181, 50 Am. Dec. 727."

We also approve the language used by the Supreme Court of Alabama in *Gandy v. Humphries,* 35 Ala. 624, which is as follows:

"It is extremly difficult, if not impossible, to settle by exact definition what declarations are to be considered as forming parts of the *res gestae.* It has been said, in general terms, that the idea of the *res gestae* presupposes main fact, and includes only such circumstances, facts, and declarations as grow out of the principle transaction, are contemporaneous with it, and serve to illustrate its character. *Lund v. Tyngsborough,* 9 Cush. (Mass.) 36; *Carter v. Buchannon,* 3 Ga. 517; 1 Greenl. Ev. § 108. The imperfection of this definition has, however, been frequently admitted; and, as is the case with most legal generalities, many difficulties have been found in its application to the various cases which have arisen in practice. When it is said that declarations, to be admissible as parts of the *res gestae,* must be contemporaneous with the principle transaction, it is not meant that they shall be exactly coincident in point of time with the main fact. If they appear to spring out of the transaction—if they serve to elucidate it, and are made so shortly after the happening of the main fact as to stand in the relation of unpremeditated result to it, the idea of deliberate design in making them being fairly precluded by the surrounding circumstances—then they may be regarded as contemporaneous. *Mitchum v. State,* 11 Ga. 615; *Commonwealth v. McPike,* 3 Cush. (Mass.) 181, 50 Am. Dec. 727; *Handy v. Johnson,* 5 Md. 450; *Hart v. Powell,* 18 Ga. 639; *Land v. Tyngsborough,* 9 Cush. (Mass.) 36; *Carter v. Buchanon,* 3 Ga. 517; *Rawson v. Haigh,* 2 Bing. 99; *Traun v. Keiffer,* 31 Ala. 137; 1 Greenl. Ev. § 108, and notes. The declaration of the plaintiff, the admission of which was one of the matters excepted to on the trial, answers all of these conditions and we think there was no error in permitting it to go to the jury."

To our minds the best discussion of *res gestae* which we have found in the books is contained in *Mitchum's Case,* 11 Ga. 621 As this is a question of great importance, and difficulty, and as it may arise in the trial of any case, we will copy and adopt this part of the opinion. It is as follows:

"The rejection of the sayings of the prisoner, as proven by Thomas Gilbert, we think was an error, and upon this and one other ground to be noticed in its order, we are constrained to award a new trial. A well ascertained rule of evidence is that a party cannot be permitted to manufacture evidence for himself. A consequence flowing out of this rule is that the sayings of a party in his own behalf cannot be proven. There are exceptions to the inadmissibility of such sayings, and however well founded in reason and justice the rule may be, the exceptions are vindicated by both reason and justice. It is, however, right to guard the rule with severe vigilance, and to admit the exceptions with great caution. Without such a rule it would be competent for every criminal to provide for his acquittal with a very moderat amount of forecast and self-possession, and go 'unwhipped of justice,' whilst at the same time, without the exceptions, in some cases, innocence would meet the felon's fate. For example a man of untarnished life and character is found on the highway with an instrument of death in his hand, reeking with blood, but freshly drawn from the heart of one who is expiring at his feet. With no witness to the transaction, such a man is convicted by the circumstances, and would, by the operation of the general rules of the law, die as a murderer. In the moment of discovery, however, he is heard to exclaim, 'I slew him in defense of my life.' The admission of these sayings would save the life of an innocent man, whilst their exclusion would consign him to the gallows. The case supposed is an extreme one, and is given for illustration, and not for the purpose of testing the correctness of the ruling is this case. In the language of this court, in *Monroe v. State;* 'If we unconditionally refuse to allow a defendant under any circumstances, to have his conduct interpreted by his acts and speech, we shall frequently deliver over the accused a helpless and hopeless sufferer to the penalty of the law.' 5 Ga. 132. Whenever the sayings constitute a part of the *res gestae,* they are within the exception, and are admissible. We consider that the excluded sayings of the prisoner in this case were a part of the *res gestae.* What, then, is meant by *res gestae?* I cannot more satisfactorily answer this question than by transcribing what I said on a former occasion. 'The idea of the *res gestae* presupposes a main fact. With this preliminary remark, I answer that the *res gestae* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. I do not claim that this definition is perfect, for I know that the *res gestae* are different in different cases. No definition could be found so comprehensive as to embrace all cases. Hence it is left to the sound discretion of the courts what they shall admit to the jury along with the main fact, as parts of the *res gestae.* But perhaps this definition embraces as nearly all that is meant in legal parlance by that phrase as any other that can be drawn from the books. One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends upon the character of the transaction. It is, however, well settled that the acts of the party, or the facts or circumstances or declarations which are sought to be admitted in evidence, are not admissible, unless they grow out of the principal transaction, illustrate its character, and are contemporary with it.' Again I say: 'Declarations as parts of the *res gestae,* made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. An indispensable characteristic of declarations is that they must be made at the time of the act done, which they are supposed to characterize; and, further, they must be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction.' *Carter v. Buchannon,* 3 Ga. 517, 518. As applicable to this case, I refer also to the proposition stated by Judge Lumpkin, in his opinion in *Monroe v. State*. It is this: When an act is done to which it is necessary to ascribe a motive, it is always considered that what is said at the time, from which the motive may be collected, is a part of the *res gestae.' .Monroe v. State*, 5 Ga. 85. In determining questions about the *res gestae,* it is an error to undertake to test them by a definition or rule. For what is the *res gestae* of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter. *Rawson v. Haigh,* 2 Bing. 104; *Ridley v. Cyde,* 9 Bing 349, 352; *Poole v. Bridges,* 4 Pick. (Mass.) 379; *Allen v. Duncan,* 11 Pick. (Mass.) 309.

"Adjudicated cases, determined by able courts, are safe guides; and when not to be found, like that which is before us, we are left to apply to it the principles which the rule embraces, irrespective of the rule itself. In applying these, let us inquire what is required to bring a declaration within the exception of the *res gestae*. They must grow out of the main fact. They must serve to illustrate it, and they must be made contemporaneously with it. When these things are true of declarations, they are provable, not as the testimony of the declarant, but as partaking of the nature of facts. They derive their credibility, not from his veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact, evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact itself, and would derive no enhancement of their credibility from the oath of the declarant. .Such I take to be the philosophy of the *res gestae,* so far as constituted of declarations. The weight which they are to receive at the hands of the jury will depend upon the closeness and fullness of their relation to the transaction out of which they spring, their proximity in point of time to it, and the strength of the light which they shed upon it. The motive with which an act is done is frequently the point of inquiry to which the attention of courts is directed. To ascertain that, contemporaneous declarations are admissible, 'where a person (says Prof. Greenleaf) does any act material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts.' Greenleaf's Ev. § 108. With these principles in view, we come to the immediate question made in this record. The transaction or main fact here is the killing—it is the mind or motive with which the prisoner was actuated when he slew the deceased that was to be ascertained. The great inquiry in this case (as in all cases of murder) was whether the killing was with malice, express or implied. Now if the declarations of the prisoner grew out of the killing, and were, according to the construction of the rule which I shall give, contemporaneous with it, and tend to disprove malice, then they illustrate or explain the fact of the killing, and are admissible. Adverting to the declarations, it seems that the witness was within 30 or 40 yards of the house when the deceased was shot. Upon hearing the report of the pistol, witness looked towards the house and saw a person that he took to be the prisoner run out, who ran a few paces, and turned and ran again into the house, and immediately ran out again, and ran to where witness was standing. He ran slow and awkward, which induced witness to suppose he was very drunk. When he came to witness, he seemed greatly agitated and troubled, and at the moment of his coming up to him, he exclaimed 'that he would not have done it for the world.' Gilbert further testified that '1 minute would probably cover the time from the firing until the prisoner uttered the exclamation; 2 certainly would.' For a full understanding of the point I have detailed the testimony of Gilbert with a little more minuteness than it is found in the reporter's brief. The most important matter to be considered is the time that elapsed between the killing and the utterance of the rejected exclamation. That was from 1 to 2 minutes, 'Probably,' says Mr. Gilbert, '1—certainly not more than 2.' Take the medium time between 1 and 2, and it is 1½. The agitation of the prisoner is to be noticed; also the fact that no one was in pursuit of him. No attempt had been made at the time that he spoke to the witness to arrest him. No one present at that moment had spoken to him. His coming to where witness was seems to have been voluntary, and the exclamation spontaneous. The meaning of the exclamation is also important. The natural interpretation of it seems to me to be the expression of profound regret or remorse; such as a man would feel after unintentionally killing a fellow creature. Upon the hypothesis that the killing was not a deliberate murder, but the result of a reckless, drunken bravado use of a hair-trigger, self-cocking revolver (and the defense seems to have been put chiefly on this ground), this interpretation is a fair and natural interpretation. It is true that such an exclamation, made after the fact, might be the deliberate and studied fabrication of guilt made with a view to acquittal. I must believe, however, that the circumstances do not warrant this construction, and that the former interpretation is most reasonable. The short period of time that had intervened and the agitated manner of the prisoner forbid the idea of deliberate design. He can scarcely be supposed, within 90 seconds from the fall of his victim, to have deliberated with himself upon the expediency of such declaration. He cannot be necessarily believed to have in fact so deliberated, because his running out of the house immediately after the firing, and then back again, and then out again, and his distressed and agitated appearance when he reached the witness exhibit a state of mind incompatible with such a belief. Nor do I believe that such an exclamation would readily or naturally escape from a man who had but just satisfied the demands of a murderous malice. Such a man, at such a moment, would most naturally, in his heart, exult in the very fiendishness of the act. Remorse would not, in the very moment of gratified vindictiveness, be the feeling of such a one, and, not feeling, he would not be likely to express it. Such being the most probable meaning of the declaration, does it not spring out of the act? It seems to me that it is its legitimate fruit, and bears as necessary a relation to it as an immediate effect bears to a cause. Not only so, but it serves to illustrate it. It sheds light upon the question of malice—upon the motive, or which is the same thing, the want of motive, under which the prisoner acted; that is to say, it serves to explain the killing, by showing that it was not his intention to kill, and thus rebuts the implication of malice. To what extent it will go, if to any, when considered in connection with all the testimony in the case, is for the jury to determine. My purpose in all that I have said is to bring these declarations within the rule of the *res gestae.* I mean to express no opinion as to the guilt or innocence of the prisoner.

"The requirement of the rule further is that the declarations be contemporaneous with the transaction. Now, where the books say—when this court has said—that the declarations must be contemporaneous with the act, or when they or this court say that the declarations must be made at the time of the act, it is not to be understood that we or the books assert that declarations are never to be admitted unless their utterance is exactly coincident in point of time with the act. Declarations, in the legal sense of the word, may be contemporaneous with the act, when they precede or follow the act; and when they are to be admitted and when rejected, if not coincident with the act is a question for judicial discretion, of embarrassing nicety—one which must depend upon the application of the principle upon which the rule is founded, and which I have endeavored to state, to the circumstances of each case. If the declarations appear to spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, then are they to be regarded as contemporaneous? Amplification cannot make the view which I have of this point plainer, and I shall therefore leave it here, referring to a few authorities to sustain the position that, to be contemporaneous, declarations are not always required to be exactly concurrent with the act. In *Rawson et al. v. Haigh et al.*, Park, J., says: 'It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying that a declaration made a month after the fact would itself be admissible. But if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole *res gestae.*' 2 Bing. 99. See, also, *Tompkins v. Saltmarsh,* 14 Serg. & R. (Pa.) 275; *Poole v. Bridges,* 4 Pick. (Mass.) 378; 21 Howell's St. Tr. 542; 1 Starke R. 353; *Thorndike v. City of Boston,* 1 Metc. (Mass.) 247; 9 Bing. R. 349; *Reynold's Case,* 1 Ga. 230; *Monroe v. State,* 5 Ga. 85. In this case the intervening time being only one minute and a half, and all the circumstances precluding the idea of deliberation, we are satisfied that proof of the declarations ought to have been admitted."

We might cite other cases almost without limit to the same effect, but the reasoning in the cases above quoted from is so clear and just that we do not deem it necessary to do so. We will only cite Wharton on Criminal Evidence, § 236. He there says that statements of the deceased at the time of the killing, or so soon before or afterwards as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act, are admissible as part of the *res gestae.*

There is another view supporting the admission of this class of evidence, which presents itself to our minds with great force, and that is that the same rules of law which admit dying declarations are applicable to spontaneous declarations. Both classes of evidence rest upon the same grounds, viz., necessity and sincerity. The rule of necessity is purely arbitrary. It is recognized solely upon the ground that, if dying declarations were excluded, cases would often arise where it would be impossible to convict persons guilty of murder. But before dying declarations are admissible, the necessity of the case must be safeguarded by some guaranty of the sincerity of the witness. This is found, in the presumption that, where a person has given up all hope of recovery, and realizes that he is soon to stand in the presence of his Maker and Judge, all worldly motives will be lost, and that the awful conditions which surround the party are at least equal to the sanctity and binding force of an oath or affirmation administered in a court of justice. These same rules apply with equal force to spontaneous declarations. In fact the safeguard of sincerity is greater in cases of spontaneous declarations than in cases of dying declarations. Experience teaches us that men do not always speak the truth in the presence of certain death. There may be, and often is, premeditation in connection with a dying declaration. This opens the way to fabrication. Such things are much more difficult, if not impossible, as to contemporaneous spontaneous declarations. Here there is no time for deliberation and fabrication, and experience shows that, where one speaks impulsively, under such conditions, there is almost a certainty that the truth will be told. It is the facts talking through the witness.

We do not desire to be understood as expressing any opinion as to the guilt or innocence of the defendant. That is a question with which at this time, we have nothing to do. We are simply discussing the question of the admissibility of the evidence. Its weight and credibility upon another trial, will be for the jury without reference to anything that may be said in this opinion. In this case the deceased was still suffering from the excitement of the difficulty and the shock of the wound. It is highly improbable that his mind was in a condition to deliberate and manufacture a statement. His statements were spontaneous declarations, depending for credence, not upon the veracity of the deceased, but upon their close connection with the immediate facts of the killing and the circumstances which negative the idea of premeditation or fabrication. While his words were "after talk," it cannot be said that they expressed "after thought." The connection between what he said and the main fact had never been broken. His statements were therefore contemporaneous with the acts of the killing, although not identical in time and in place. The fact that the witness Boren had, a few seconds before, spoken to deceased, and had placed him in a more comfortable position, does not indicate that the live wire which connected the mind of deceased with the shooting had been broken or in any manner been interfered with. None of the authorities hold, so far as we have found, that the defendant must have heard the exclamations made in order to constitute them a part of the *res gestae*. Therefore it was immaterial that the defendant had left the place of the difficulty before the exclamations were made. We are therefore of the opinion that the court did not err in admitting the evidence complained of as part of the *res gestae*.

Third. Defendant complains of the action of the trial court in sustaining objections to questions propounded to his witnesses, but the record does not show, except inferentially, the facts which defendant expected to prove by the witnesses, if they had been permitted to answer the questions to which objections were sustained. In the absence of such showing in the record this court cannot review the rulings of the trial court or hold that material error was committed in the rejection of competent testimony. In order to avoid mistakes, the jury should have been withdrawn, and the court should have heard the testimony. Then the record should have shown what the rejected evidence was. This court would then have been in a position to pass intelligently upon the question. As this record stands, we cannot say that the court committed material error in the ruling complained of. But as this case will be remanded for a new trial, upon other questions, we will suggest that, if it is offered to be shown, upon a second trial, that the deceased, or those acting with him, had made threats against the defendant, and that these threats had been communicated to defendant, and had been partially executed by the deceased, or those acting with him, such facts should be admitted in evidence, as the partial execution of threats according to their terms gives increased weight to the parts remaining unexecuted, and would tend to intensify the apprehensions of defendant on account of such threats, and the more readily to cause him to believe that at the time of the homicide it was the purpose of the deceased, or those acting with him, to carry out the rest of the threats, and take his life. We make this suggestion because we learn from the brief of counsel for defendant that this is the character of evidence which they desired to get before the jury in reply to the questions to which objections were sustained. If this had appeared in the record, we would have held that it was error to reject the testimony offerred.

When threats are relied upon, it is permissible for the state to introduce any evidence in its power to show that they were of such character, or came from such a source, as not to be the basis of a well-grounded apprehension of danger in the mind of the defendant. Thus in *Sims v. State,* 38 Tex. Cr. R. 642, 44 S. W. 524, it is said:

"The first bill of exceptions raises the question as to the admissibility of the character of deceased as being a peaceable and inoffensive man. It is shown by the bill that said testimony was admitted after defendant had introduced evidence of threats made by the deceased against him. We think the action of the court in this respect was proper."

Upon the other hand, it is equally true that in such cases the defendant has the right to lay before the jury any fact or facts which would tend to add weight to the threats so made, and thus intensify his apprehensions therefor. In *Russell's Case,* 11 Tex. App. 291, Judge Hurt said:

"Bearing upon the question as to whether the grounds for fearing death or serious bodily harm were reasonable, defendant had the right to lay before the jury all circumstances which go to show the character of the threats, the intention with which they were made, and the grounds of fear on which the defendant acted."

Fourth. Defendant complains of the action of the trial court in permitting counsel for the prosecution, on cross-examination, to ask a witness of defendant whom he had married, for the purpose of showing that the witness had married a woman with whom he had committed adultery. This evidence was admitted by the trial court upon the ground that it tended to affect the credibility of the witness. It is the opinion of this court that error was committed in overruling defendant's objections to this evidence.

This question came before the Supreme Court of Oklahoma Territory in the case of *Flohr v. Territory,* 14 Okla. 439, 78 Pac. 572, and in rendering the unanimous opinion of the court, Judge Gillette said:

"Upon the cross-examination of Mrs. Luella Richards, for the purpose of affecting her credibility a question was propounded to her with reference to her marriage to Dr. Richards; and when the complaining witness, C. H. Richards, was on the stand, like questions were propounded to him on cross-examination, which, if answered affirmatively, would show that Mr. and Mrs. Richards, up to the date named, had lived in adulterous relation to each other, and that during that time Dr. Richards was not divorced from his former wife, who resided in the state of Illinois. It was also sought to discredit Dr. Richards' testimony by showing upon cross-examination that in the practice of his profession he had been guilty of producing an abortion in two certain instances. All of this testimony was by the court excluded and the exclusion of it is complained of in this case. The defendants testified to certain understandings and agreements had with Dr. Richards and his wife, and with reference thereto there was a material conflict in the testimony. This cross-examination touching character was here tendered for the purpose of affecting the credibility of the witnesses. The questions propounded did not tend to question their reputation for truthfulness. They went to the general moral character, and tended to hold them up to public contempt, ridicule, and disgrace, while at the same time their general character for truthfulness may have been unimpeached, and the territory was entitled to their testimony before the jury, uninfluenced by matters irrelevant to the cause, and which do not seem to have been made the subject of legal investigation by indictment or otherwise, and as the questions propounded were entirely disconnected with the subject under investigation, and did not tend to impeach their reputation or character as truthful persons, we think the court committed no material error in excluding this evidence."

Fifth. The defendant complains that the action of the trial court in refusing to permit defendant to prove that the deceased and Jim Parks were under indictment at the time of the homicide, charged with arson, for burning the barn of defendant. It appears that the defendant was a witness against the parties for this alleged offense. There was error in the rejection of this evidence. The fact that these parties were indicted for burning the barn of defendant would not even tend to prove that they, or either of them, did burn the barn in question, but it would tend to prove that these parties had a motive for getting defendant out of the way, so that he could not testify against them; and whether the charge of arson was true or false, the pendency of the indictment would tend to increase the apprehensions of defendant on account of the threats, claimed to have been communicated to him as having been made by deceased and Parks before and after the date of the alleged burning of his barn. The rejected testimony should have been admitted upon these two grounds. It will not be disputed that any circumstance which would tend to prove a motive, on the part of the defendant, to kill deceased would have been admissible in evidence against him. In this case, when the plea of self-defense was interposed, and there was testimony that the deceased fired the first shot, the motive of the deceased and Parks became just as material as was the motive of the defendant, and any evidence tending to show the motive of either of them should have been admitted.

Sixth. Defendant complains of the action of the court in refusing to allow proof of threats made against him by Jim Parks when the deceased was not present. This evidence was offered on the theory that Parks and deceased were acting together. The trial court held that there was no evidence in the record of such acting together, and that therefore threats made by Parks, not in the presence and hearing of deceased, were not admissible. We do not desire to be understood as expressing any opinion as to the weight of the evidence or the credibility of the witnesses, but we cannot agree with the trial court in saying that there is no testimony in this record tending to show that these parties were acting together in this matter. As to what credence the jury should give to this evidence is not for this court to say. It is enough for us to know that there is some evidence in the record to this effect. In 2 Wharton on Evidence, § 1205, we find the following:

> "When a conspiracy is shown to exist, which is usually inductively from circumstances, then the declarations of one conspirator in furtherance of the common design, as long as the conspiracy continues, are admissible against his associates, though made in the absence of the latter. *The least degree of concert or collusion between the parties to an illegal transaction makes the act of one the act of all.*" (See, also, *Phillips v. State*, 6 Tex. App. 380: *Hannon v. State*, 5 Tex. App. 549).

Seventh. The defendant complains that the court erred in not permitting him to state what impression the conduct and language of deceased and Jim Parks made upon defendant. The defendant had just testified that the deceased and Jim Parks had entered the saloon where defendant was; that they both drank. either whiskey or beer; that deceased and Parks then held a low conversation, which defendant did not understand; that defendant had turned to leave the saloon, and that deceased and Jim Parks moved up, and came around immediately in front of defendant; that Parks hummed and danced a jig; that deceased came up behind Parks, and looked in the face of defendant and said, "I am the best God damn man in Sayre"; that deceased looked at defendant in a vicious manner; that deceased and Parks were then two or three feet in front of defendant. The defendant was then asked: "What conclusion did you arrive at, at that time with reference to these parties and their intentions?" On objection being made, the defendant was not permitted to answer the question. In the light of the entire evidence in this case—of threats claimed to have been made against defendant by deceased and Parks, and of previous alleged troubles between them—we think that it was error to refuse to allow the defendant to state what conclusion he arrived at from their conduct. The very question which was then under consideration was as to the state of mind of the defendant. The jury would not have been bound by the answer of the defendant as to his state of mind or purpose. But it should have gone to the jury for their consideration, in the light of all the other facts and circumstances in evidence before them. We are also of the opinion that the statements, made by the defendant to his sons Herbert and Walter at the time, about getting the team and leaving should have been admitted as a part of the *res gestae* of that transaction, for statements made by a defendant which are a part of the *res gestae* are as much admissible in his favor as statements made by the deceased are admissible against a defendant upon the ground of *res gestae*. The law has no favorites, and makes no arbitrary distinctions between parties. The prosecution had fully presented its side of this portion of the difficulty, which resulted in the death of deceased. Every circumstance and word unfavorable to the defendant had been clearly brought out. Common justice and fairness required that the defendant should have been permitted to present his side of the matter with equal latitude. That which is unfair and unjust will not be permitted by this court to be enforced as law in Oklahoma, unless clearly commanded by the statutes of the state.

Eighth. Defendant complains of action of the trial court in charging the jury as follows:

> "The term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it, arising out of the evidence in the cause; such a doubt as you are able to find in the evidence, or lack of evidence, a reason for."

This very question has been passed upon by the Supreme Court of Oklahoma in the case of *Abbott v. Territory,* 20 Okla. 119, 94 Pac. 179. It was there held by Chief Justice Williams, with all the Justices concurring, that it was reversible error to charge a jury that "by the term 'reasonable doubt' is meant a doubt you can give a reason for." We concur in the reasoning of Chief Justice Williams, and the conclusion reached in the *Abbott Case,* and it will be followed by this court. In addition to the authorities cited and discussed in *Abbott's Case,* we call attention to *Wallace's Case,* 9 Tex. App. 300. It is there said:

> "The legal presumption of innocence is not removed, or the jury entitled to convict, until the guilt of the accused is established by the evidence, not to the exclusion of a reasonable belief to the contrary, but beyond a reasonable doubt."

The vice in the instruction of which the defendant complains is that it requires the jury to convict unless they find in the evidence a doubt for which they can give a reason. This shifts the burden of proof, and reverses the humane principle of our law, which requires the jury to acquit unless they can say that the defendant is guilty beyond a reasonable doubt. The instruction forces a conviction unless the jury are able to find a doubt for which they can give a reason, while the law requires an acquittal unless the jury can say there is no reasonable doubt.

In *Blocker's Case,* 9 Tex. App. 279, the court said:

> "It is not essential to an acquittal that the jury should entertain a reasonable belief, or any other kind of belief, that the defendant is not guilty, but the law presumes that he is not guilty until his guilt is established by competent evidence to the satisfaction of the jury, beyond a reasonable doubt, * * * and it might often happen that a jury is required, under the law and the evidence, to return a verdict of acquittal when each member of the jury might reasonably believe that the defendant was not innocent."

In *Smith's Case,* 9 Tex. App. 150, the court said:

> "And when a jury are unable to say upon their oaths, from the evidence, that the defendant upon trial is proven guilty beyond a reasonable doubt, the law requires them to return a verdict of acquittal, whether they believe him guilty or not."

We do not mean that this language should be given in an instruction to the jury. We make these suggestions as a matter of argument, to show the error in the instruction given. The words "reasonable doubt" in our statute are used in their ordinary sense in common acceptance among the people. An instruction in the language of the statute is sufficient, and is by far the safest course to pursue. Any effort to elucidate the meaning of the words "reasonable doubt" is dangerous, as will be found from an examination of the decided cases. In *Bramlette's Case,* 21 Tex. App. 619, 2 S. W. 766 (57 Am. Rep. 622), the court said:

> "The charge of the court was substantially, if not literally, in the language of the statute. This is not only all that the court is required to do, but is exactly what it should do in charging the reasonable doubt."

We commend this practice to the trial courts of the state. By adhering to it the needless reversal of many cases will be avoided. There are two other objections to the instruction on reasonable doubt, as given in this case, to which we desire to call attention. These instructions cover three typewritten pages. Taken as an entirety, the instructions are cumulative and argumentative. It is error for a trial court, by constant repetition and reiteration, to give undue prominence to even a correct statement of the law. It unduly impresses the propositions so repeated, and fixes them on the minds of the jurors as the controlling propositions in the case. In *Irvine's Case,* 20 Tex. App. 41, the court said:

> "We will not discuss *seriatim* the objections made to the charge of the court. It occurs to us that in more than one respect it is obnoxious to the criticisms made by appellant's counsel, and the objections urged to it. In *Traylor v. Townsend,* 61 Tex. 144, the court says: 'It is undoubtedly improper for a court to place by frequent repetitions, too prominently before a jury any principle of law involved in the case'—citing *Powell v. Messer,* 18 Tex. 401. And especially is such rule important in a criminal case, in order to guard against creating an impression upon the minds of the jury as to what may be the opinion of the court with regard to the facts to which the principle is applicable. *Horan v. State,* 7 Tex. App. 183; *Owen v. State, Id.* 332, *Smith v. State, Id.* 383."

The trial court cannot charge directly upon the weight of the evidence. Why, then, should it be permitted to convey to the minds of the jurors what the court thinks about the case by these constant repetitions? No one can read the instructions given in this case upon the subject of reasonable doubt without being impressed with the idea that in the opinion of the trial court there was no such doubt in this case, and that it was the opinion of the trial judge that the jury should convict this defendant. While the trial judge doubtless did not intend to produce this result, yet we are dealing with consequences, and not with intentions, and we feel it our duty to admonish trial courts in Oklahoma to avoid such instructions in the future. We know that it is often impossible to give all of the law applicable to one branch of a case in a single paragraph or an instruction; but, where it is necessary to refer to the same proposition of law more than once in instructions, care should be taken to do so in such language as will not give it undue prominence. Instructions should simply state the law applicable to the evidence. Arguments should be made only by the counsel in the case. Thompson in Trials (volume 2, § 2301) says:

> "The judge should hold the scales of justice evenly, and not assume the character of an advocate. Argumentative instructions trench upon the province of the jury, and therefore should not be given."

Ninth. Defendant contends that the trial court erred in giving the following instruction:

> "The jury are instructed that, where the evidence shows beyond a reasonable doubt that the homicide was committed by the defendant, and the defendant seeks to avoid the responsibility for the killing on the grounds of self-defense, it *must be apparent from the evidence* that the circumstances and surroundings of the defendant at the time of the homicide were such as to cause in him the reasonable belief, founded on reasonable evidence, that he was in imminent danger of death or great bodily harm at the hands of the deceased, *and, before the defendant can be excused, he must have used all reasonable means within his power consistent with his safety to have avoided the danger which apparently threatened him, and to have averted the necessity for the killing.* If by the exercise of any reasonable means within his power consistent with his safety the defendant could have avoided the surroundings as they existed at the time of the homicide, and thus

averted the necessity for the killing, it was his duty to have done so, *and unless he did use all means consistent with his safety to have averted the necessity for the killing, he cannot be excused on the grounds of self-defense."*

The effect of this instruction was to inform the jury that they must affirmatively find two facts before they could acquit the defendant: First, that it must appear from the evidence, or in other words, that the jury "must find from the evidence, that the circumstances and surroundings of the defendant at the time of the homicide were such as to cause in him the reasonable belief, founded on reasonable evidence, that he was in imminent danger of death or great bodily harm at the hands of the deceased." Second, that the jury must find, as an affirmative fact, that the defendant had used all means consistent with his safety to have averted the necessity of the killing, and that, unless they found these facts from the evidence, the defndant would not be excusable, and that the jury should convict defendant. We do not so understand the law. This instruction is utterly inconsistent with, and directly contradictory to, the fundamental principle of criminal law that all persons charged with crime are presumed to be innocent until they are proven to be guilty, by competent evidence, beyond a reasonable doubt, and that the burden is not upon a defendant to prove his innocence, but is at all times upon the state to prove his guilt beyond a reasonable doubt. Neither is it the law that when a person is threatened with death or great bodily injury he must use all means consistent with his safety to avert the necessity of killing his assailant before he will be justified in doing so. This instruction destroyed the right of the defendant to act upon appearances of danger. It took from defendant the right to have the jury view the facts and circumstances of the case from the defendant's standpoint. It required that the defendant should have tried to run away before he could have exercised the right of self-defense. If this instruction is correct, then the right of self-defense can only be exercised by cowards and slaves, and as to brave men and free men it is a mockery, a snare, and a delusion. How different the just and humane rule recognized and laid down by Judge Burford in *Kirk v. Territory,* 10 Okla. 76, 60 Pac. 806, as follows:

"A man may repel force by force in the defense of his person, habitation, or property, against any one, or many, who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if in the conflict between them he happen to kill him, such killing is justifiable. 2 Wharton on Crim. Law (7th Rev. Ed. Phila. 1874) § 1019. See, also, *Gallagher v. State,* 3 Minn. 270 273 (Gil. 185, 188); *Pond v. People,* 8 Mich. 150, 177; *State v. Dixon,* 75 N. C. 275, 295; *State v. Sherman,* 16 R. I. 631, 18 Atl. 1040; *Fields v. State,* 134 Ind. 46, 32 N. E. 780; *Eversole v. Commonwealth,* 95 Ky. 623, 26 S. W. 816; *Haynes v. State,* 17 Ga. 465, 483; *Long v. State,* 52 Miss. 23, 35; *Tweedy v. State,* 5 Iowa, 433; *Baker v. Commonwealth,* 93 Ky. 302, 19 S. W. 975; *Tingle v. Commonwealth,* (Ky.) 11 S. W. 812; 3 Rice's Ev. § 360."

In *Mahaffey v. Territory of Oklahoma,* 11 Okla. 231, 66 Pac. 348, Judge Hainer correctly said:

"It is always incumbent upon the prosecution to establish each and every material element of the crime charged in the indictment by competent evidence, beyond a reasonable doubt, before the jury is warranted in finding the defendant guilty of the crime charged in the indictment, or any lesser offense therein contained. The vice of the instruction is that it requires the defendant to establish by the evidence, beyond a reasonable doubt, that he had wholly retreated to a place of apparent security before his right of self-defense was fully restored. We think the correct rule is this: That every person has the right to act in his own necessary self-defense; and, where a person is in a place where he has a right to be, and is not the aggressor in bringing on the conflict, and is assaulted by another person in such a way as to place him in danger of death or great bodily harm, the person thus assaulted is not bound to retreat, but, on the contrary, may stand his ground and repel the danger in which he is placed with such force as will repel the attack and protect his person from serious bodily harm, and, when it is necessary to protect himself from deadly assault, or from receiving great bodily harm, even to take the life of his assailant. And such person will not be held responsible criminally if he acts in self-defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. *Kirk v. Territory,* 10 Okla. 46, 60 Pac. 797; *Beard v. United States,* 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; *Steinmeyer v. People,* 95 Ill. 383; *Roach v. People,* 77 Ill. 25; *Crews v. People,* 120 Ill. 317, 11 N. E. 404; *State v. Fraunberg,* 40 Iowa, 555; *State v. Bohan,* 19 Kan. 28; *Murry v. Commonwealth,* 79 Pa. 311."

In *Allison v. United States,* 160 U. S. 203, 16 Sup. Ct. 252, 40 L. Ed. 395, Chief Justice Fuller, in rendering the unanimous decision of the court, in speaking of what it takes to constitute an overt act on the part of the deceased to justify a defendant upon the charge of murder, said:

"What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger, under other circumstances this would not be so. And it is for the jury, and not for the judge passing upon the weight and effect of the evidence, to determine how this may be. In this case it was essential to the defense that the jury should be clearly and distinctly advised as to the bearing of the threats and the appearance of danger, at the moment, from defendant's standpoint, and particularly so as it did not appear that the deceased then had a pistol upon him, though there was evidence that it was his habit to carry one, and that he had had one immediately before."

In *Jordan's Case,* 11 Tex. App. 449, the court said:

"Again, in the paragraph quoted from the charge the jury were further told: 'If you believe he [defendant] did know he was in no such danger, or could have known it by reasonable care exercised, then such killing would not be justifiable.' A party who has reasonable expectation or fear of death or serious bodily harm, imminent and pressing under the circumstances as they appear to him, is not required to wait until he has by the exercise of reason carefully examined all the facts necessary to be known as to the truth and correctness of his apprehensions. To require this would be to render entirely nugatory and worthless the kind and humane provision of the law which allows him to act, and act promptly, even to the taking of his assailant's life, when it reasonably appears by the acts, or by the words coupled with the acts, of the person killed that it was the purpose and intent of such person to take his life or to do him some serious bodily harm. When a man has a reasonable expectation or fear of death or of some serious bodily harm from an unlawful attack made upon him, he may kill, and kill upon the very spur of the moment; and the law will justify the homicide, without requiring him to show that by the exercise of additional care the killing could not have been avoided with safety to himself."

We desire to emphasize the idea that, in a trial for murder, the jury should be clearly and distinctly instructed that the facts in evidence must be viewed from the defendant's standpoint, and as they reasonably appeared to him at the time of the homicide, in the light of all the evidence in the case. There is just ground of complaint against the instruction given, because it says: "If by the exercise of any reasonable means within his power, consistent with his safety, the defendant could have avoided the surroundings as they existed at the time of the homicide, and thus averted the necessity for the killing, it was his duty to have done so." This made the guilt of the defendant rest upon the surroundings as they existed in fact, and not the surroundings as they appeared to the defendant, taking into consideration all of the facts and circumstances of the case in evidence, and as defendant, as a reasonable man, then had the right to consider them. In support of the conclusion which we have reached, in addition to the authorities above quoted, we will cite the case of *State v. Reed,* 53 Kan. 778, 37 Pac. 179 (42 Am. St. Rep. 322). This court says:

"Another complaint is with reference to an instruction given upon the subject of self-defense, in which the court told the jury that, if one is unlawfully attacked by another, he may stand his ground and use such force as reasonably appears necessary to repel the attack and protect himself. The criticism is that the instruction given leaves the jury to infer that the appearances were to be judged by them, and not by the defendant. 'A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are.' *State v. Howard,* 14 Kan. 175."

The cases quoted from express our views so clearly and fully that we are relieved from the necessity of making an elaborate argument upon this matter. But it is contended, upon behalf of the state, that any errors which may have been committed in the instruction complained of were cured by the following instruction given to the jury:

> "You are instructed, as a matter of law, that if a person believes, and from his standpoint has a reasonable cause to believe, that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor with deadly weapons, and he makes demonstrations such as to cause such person to believe that he is to be attacked, then the person so threatened is not required to retreat, but he has the right to stand and defend himself, and to pursue his adversary, if necessary, until he has secured himself from danger; and, if in so doing it is necessary, as viewed from his standpoint, in the light of all the evidence, or reasonably appears to be necessary, to kill his adversary, the killing is excusable on the ground of self-defense, and this is true notwithstanding it may afterwards appear that such apprehended danger was not real, but only apparent. A person need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant. It is sufficient if, in good faith, he has a reasonable belief, from the circumstances as they appear to him at the time, that he is in such imminent peril."

This instruction is not itself above criticism, and we do not desire to indorse it as a model, but conceding, for the sake of the argument, that it is an absolutely correct statement of the law, does it necessarily cure the errors pointed out in the instruction complained of? We concede the contention of the state that instructions are to be construed as a whole, and if, when so construed, they clearly and correctly state the law, then the instructions are sufficient. But this does not mean that an erroneous instruction upon a material issue can be cured by giving a correct instruction upon the same question in another portion of the instructions. Can instructions which are self-contradictory be harmonious and sufficient? Who can tell which instruction was followed by the jury? If the court did not harmonize the instructions given, how can it be expected that the jury could or would do so? If juries are to pass upon the sufficiency of instructions, then are they not the judges of the law as well as the facts? Instructions should be clear, explicit, and free from ambiguities and contradictions; otherwise they may confuse and mislead the jury. The Supreme Court of Colorado, in *Clare v. People,* 9 Colo. 125, 10 Pac. 801, said:

> "Where the charge in a criminal case contains in part an important correct legal proposition, and in another an incorrect and conflicting proposition, and upon the same subject, the subject referred to being material to conviction, it cannot be said that the error is avoided; for it is impossible to know upon which proposition the jury relied. To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby. *Mackey v. People,* 2 Colo. 13; *People v. Campbell,* 30 Cal. 312; *Caw v. People,* 3 Neb. 369; *Greene v. White,* 37 N. Y. 407, and cases cited."

In the case of *State v. Hartzell,* 58 Iowa, 520, 12 N. W. 557, the Supreme Court said:

> "The instruction is clearly erroneous because the defendant would have been justified in using a deadly weapon, if he had reasonable grounds to believe that he alone would receive great bodily harm if he did not do so. The Attorney General does not claim otherwise, but he insists that there are other instructions in which the rule is stated differently. It is true that in the thirty-first, and perhaps other instructions, it is said, if either the defendant or his brother were in danger of receiving great bodily harm, then the defendant was justified in using a deadly weapon. One great difficulty in the case is the instructions are too voluminous, and therefore tend to confuse. But the best that can be said is two rules have been laid down for the guidance of the jury, and they may have adopted the erroneous instead of the correct rule. The instructions are contradictory, and therefore liable to confuse."

While there are a few cases in the reports which hold otherwise, yet we have not found a single well-considered case which fails to hold that, where the instructions given are contradictory upon a material question, it is ground for reversal. We will adopt this rule, because it is reasonable and just, and well supported by the overwhelming weight of the authorities.

Tenth. The defendant complains of the refusal of the trial court to give the following special instruction, requested by the defendant:

"You are instructed that, if you find from the evidence that the deceased, Yandell and the deceased Jim Parks, prior to the time at which they lost their lives, had made threats against the defendant, and had threatened to do him bodily injury or take his life, and if you further believe that at the time of the difficulty in which they lost their lives they were acting in concert, in an attempt to assault and injure him or take his life, then the defendant was justified in defending himself, even to the taking of the lives of the said deceased, and he will not be held responsible, if afterwards it should appear that he was mistaken in his belief, if from the evidence taken all together it appears from such threats and the acts of the said deceased at such time that he had reasonable cause to believe, and in good faith did believe, that it was their purpose, at such time, to do him great bodily injury or take his life."

We do not altogether approve the form of this requested instruction, but it was sufficient to call the attention of the court to the matter, and the court should either have given the instruction requested, or should have given a proper instruction on the subject of threats. The court charged the jury as follows on this question:

"Previous threats, made by the deceased against the defendant, whether communicated to the defendant or not, and any previous injuries done by the deceased to the accused, if any such are shown by the evidence, will not justify the defendant in taking the life of the deceased, unless at the time of the homicide the deceased was making some demonstration, or doing some act, which would raise in the mind of the defendant the reasonable belief that the deceased designed and intended, at the time of the homicide, to carry such threats into immediate execution, and unless from all the facts and circumstances surrounding the homicide the defendant honestly believed that he was in danger of death or great bodily harm at the hands of the deceased, and that such belief was based upon reasonable evidence, the homicide cannot be excused on the grounds of self-defense. And if the jury believe from the evidence beyond a reasonable doubt that at the time of the homicide the deceasd was not making any demonstration or doing any act which would induce a reasonable belief in the mind of the defendant that he was about to do him some great bodily harm, and that the act of the defendant in taking the life of the deceased was not necessary, or apparently necessary, in the reasonable and necessary defense of himself or his son against great bodily harm, which threatened, or apparently threatened, him by the deceased, then the plea of self-defense cannot avail, and the jury should find the defendant guilty."

It will be seen that, so far as the rights of the defendant are concerned, this instruction on threats is negative in form. It tells the jury of all the conditions under which the defendant would not be justifiable, but it nowhere tells the jury in a clear and affirmative manner, the conditions under which the defendant would be justifiable in acting upon the appearances of danger in connection with threats. Both sides of the question should have been fully and fairly presented to the jury. The charge given by the court, as far as it goes, is proper, but it should have gone further, and presented the affirmative side of the question, and informed the jury that, if the deceased, Yandell, or the deceased and Jim Parks had threatened to inflict serious injury upon or to kill the defendant, and if these threats had been communicated to the defendant before the time of the homicide, and if at the time of the homicide the deceased or the deceased and Jim Parks, by some act then done, manifested a purpose to carry, at that time, such threats into execution, and if from the threats so communicated to the defendant, and from all of the words and acts of the deceased, Yandell, or the deceased and Jim Parks at that time, it then reasonably appeared to the defendant from his standpoint, and he did in good faith honestly believe that the deceased, Yandell, or deceased, Yandell, and Jim Parks had then done some act indicating a manifest purpose upon their part to then carry such threats into execution, then and in that event, the defendant would have had the right to defend himself even to the extent of taking the lives of deceased, Yandell, and of Jim Parks, and that in so doing the law would hold him guiltless, even though it might afterwards appear that he was mistaken, provided only that he acted in good faith and upon such reasonable appearances of danger, and that if the jury so found, or if they entertained a reasonable doubt upon this issue, they should acquit the defendant. It was error to present the negative side of the question, and neglect and refuse to present the affirmative side, as above indicated.

In this case there was no necessity for an instruction upon the law of uncommunicated threats.

For the errors hereinbefore pointed out, the judgment against the defendant is reversed, and the cause is remanded.

BAKER and DOYLE, JUDGES, concur.

ARTHUR HINSLEY V. UNITED STATES.

No. 749, Ind. T. Opinion Filed November 19, 1908.

(98 Pac. 365.)

1. **APPEAL—Review—New Trial—Grounds—Sufficiency of Evidence.** A new trial will not be granted for insufficiency of the evidence, or where the evidence is conflicting, or because the verdict is contrary to the evidence; these questions being within the discretion of the trial court, its decision will not be disturbed on appeal, unless it appears that the trial court abused its discretion touching these matters.

2. **CORPUS DELICTI—Sufficiency of Evidence.** To warrant or sustain a conviction for crime, there must be evidence sufficient to prove that the offense was committed, and also to inculpate the defendant in the commission thereof.

3. **APPEAL—Review of Evidence.** Upon the overruling of a motion for a new trial by the trial court upon the ground that there is no evidence to support the verdict, when the overruling of such motion was properly excepted to and preserved in the record, and is made the basis of an assignment of error, it is the duty of the appellate court to review the evidence; and, if the record discloses that there is no evidence to support the verdict, a new trial should be granted.

(Syllabus by the Court.)

Error from the United States Court for the Central District of the Indian Territory; before Justice Thomas C. Humphrey.

Arthur Hinsley was convicted of manslaughter, and appeals. Reversed and remanded.

Appellant, Arthur Hinsley, was indicted in the United States court for the Central district, Indian Territory, sitting at Durant, which indictment was duly returned by the grand jury and filed in said court on the 15th day of November, 1905, wherein said appellant was charged with having on the 6th day of November, 1905, within said district, committed the crime of murder, in the killing of Clarence Schwartz. On the 17th day of November, 1905, the appellant was duly arraigned and entered a plea of not guilty, and upon his motion this cause was continued to the next term of said court. On February 28th, 1906, he was found guilty of the crime of manslaughter, and on the same day filed in open court his motion for a new trial, which motion was by the court on the 3d day of March, 1906, overruled; and the court sentenced appellant to imprisonment in the training school for boys at Boonville, in the state of Missouri, for the term of two years. A writ of error was duly allowed to the United States Court of Appeals for the Indian Territory, sitting at South McAlester, and this cause was pending in said Court of Appeals at the time of the organization of the state of Oklahoma, and was duly removed to the Supreme Court of the state of Oklahoma by virtue of the terms and provisions of the enabling act and the Constitution of the state of Oklahoma, and was, by the Supreme Court of this state, in pursuance of an act of the legislative assembly of the state of Oklahoma, entitled "An Act creating a Criminal Court of Appeals and defining the jurisdiction of said court," approved May 18, 1908 (Laws 1907-08, p. 291, c. 28), transferred to this court.

The appellant, Arthur Hinsley, a boy of about 13 years, the deceased, Clarence Schwartz, a boy of 12 years, and appellant's brother, McKinley Hinsley, a boy of 10 years, were schoolmates, playmates, and friends, living near each other in the town of Caddo, Ind. T., for a considerable length of time before the killing occurred. These boys were in the habit of accompanying each other to and from school, and on hunting expeditions. On the morning of the day that the killing occurred the appellant and deceased were on their way to the public school in said town, and on their way planned a hunting trip, to take place after school of that day. They went from the school together at noon as usual, and during the noon hour deceased called at the home of appellant, and invited him to go to the hardware store, where they purchased a box of loaded shells (cartridges), and also stopped at a drug store near by and bought a tablet, taking the shells to the home of appellant and returning to school together in the afternoon. After school they went to the home of deceased, where the deceased remained to do some chores for the evening, while the appellant went to his home nearby. After waiting some time for the deceased, appellant, with his little brother, McKinley, started to the hunting ground, stopping for a short time at the National Bank corner in Coddo. In the meantime deceased had called at the home of appellant, but not finding him there he proceeded downtown to join appellant for the hunt agreed upon. The three boys met at said bank corner, and started for the hunting ground in Ainsworth's pasture. Soon after starting they met another playmate, named Edmond Franklin, whom appellant invited to join them on the hunt, but he did not go. When they reached the tank in said pasture, they amused themselves for a time shooting birds. Leaving the pasture for home, about sundown, and when they reached a point near the top of a hill on their way home, a dog which they had with them acted in a manner to indicate that he was about to locate a rabbit, and appellant, observing the dog's conduct, called to the deceased and appellant's little brother to scatter out, that the dog would likely "jump a rabbit." At this time appellant, who had the only gun in the party, raised his gun to prepare to shoot the rabbit, and his thumb slipped off the hammer and the gun was discharged, killing Clarence Schwartz, who stood a short distance from where appellant's brother, McKinley, stood at the time the gun was discharged. The gun was loaded with shot, the load taking effect in the left side of deceased, injuring his left arm to some extent, and killing him instantly. Appellant and his brother, after the discharge of the gun, went to the side of deceased and found him fatally wounded, and soon thereafter left him and started for home, going as far as the pasture gate, stayed there a short time, and went back to the deceased, and, leaving him a second time, went to their home. Appellant was sick all night after the killing, and was too ill to go to school next morning.

The boys did not report the killing to their parents, but, on the contrary, both denied knowing anything about it, and continued to deny all knowledge of the same until the second day after the killing, when both appellant and his brother, McKinley, confessed their knowledge of the killing, and claimed that it was accidental, explaining the accident in detail. The boys made their confession to Town Marshall Braudrick, separate from one another, and at different places, but their explanations of the killing were identical, and were in strict accordance with their testimony at the trial. About 1 o'clock of the day following the killing deceased's father, in search of his son, called at the home of appellant, but, he being at school, in company with the father of appellant, they went to the schoolhouse, where they found him, and he again denied all knowledge of the killing, but stated that he left deceased in the pasture with some other boys, who had a target gun. Upon being invited to go to the pasture with them, the three together proceeded to the pasture in question, and, reaching the pasture, pointd out a spot some distance from where the body was found as the place where he had left deceased. Others joined in the search for deceased, including two women of the neighborhood, who soon after the searching party reached the pasture found the body lying on the hillside, at the place where he was killed. An examination of the body revealed the fatal gunshot wound in the left side, and some abrasions of the skin on the left arm, and also found a circular abrasion of the skin about the size of a dime on his left hand. Appellant, continuing to deny all knowledge of the killing, was taken to the city jail or calaboose, together with his brother, McKinley, Edmond

Franklin, Avon Franklin, and Roy Fuller, where they remained all night. The next morning all the boys, except appellant, were released from the prison, he remaining alone in prison from 9 o'clock until 11 o'clock in the morning, when he confessed his knowledge of the killing as aforesaid.

Appellant filed his motion for a new trial in due time in the court below, asking for a new trial for the reasons: (1) That the verdict of the jury finding the defendant guilty of manslaughtr, as charged in the indictment, is not supported by the evidence. (2) That the verdict of the jury finding the defendant guilty of manslaughter, as charged in the indictment, is contrary to the evidence. (3) That the verdict of the jury finding the defendant guilty of manslaughter, as charged in the indictment, is contrary to law. (4) That the court committed error in instructing the jury in this case on the law and theory of manslaughter. (5) That the court erred in instructing the jury as to the law of manslaughter, and that the said instructions do not correctly state the law of manslaughter, and that such error was prejudicial to the defendant. (6) The court erred in refusing the following instruction requested by the defendant: "The government having failed to show by competent testimony affirmatively that the defendant was capable of discerning good from evil, you are instructed to acquit the defendant." (7) The court erred in permitting the testimony of Ernest Bagwell, a witness for the government, to go to the jury over the objection of the defendant. (8) That the entire instruction of the court was erroneous and prejudicial to the rights of the defendant, in that it is in the abstract and ambiguous, and so worded and constructed as to confuse the jury as to the law applicable to the facts or evidence adduced in the case.

Said motion being overruled by the court below, to which the defendant duly excepted, and appealing to this court, assigns and urges the following errors: First. That the court erred in overruling defendant's motion for a new trial, based on the ground that the verdict of the jury was not supported by the evidence, and was contrary to the evidence. Second. That the court erred in overruling defendant's motion for a new trial, based on the ground that the verdict in this case was not supported by the law, and was contrary to the law. Six other assignments of error are relied upon for reversal herein by appellant, and are in substance as follows: That the court erred in instructing the jury in this case in the law of manslaughter; in refusing to give instructions requested by appellant; in the admission of the testimony of Ernest Bagwell; for the reason that the instructions of the court were ambiguous; in overruling appellant's motion for a new trial; and in sentencing accused.

Ten witnesses were sworn and testified for the prosecution.

The first, Dr. E. T. Smith, who described the wounds found upon the body of the deceased, testifying that they were gunshot wounds, and fatal.

John Schwartz, father of the deceased, testified in substance that his son, in company with other boys, left his home the evening of the day of the killing after school, and that he failed to return that night; that the next morning he instituted search for his son, and, going to the home of appellant about 8 o'clock in the morning, found him in bed sick; that appellant stated to him at this time that he left deceased at or near the water tank in the Ainsworth pasture the evening before with some other boys who had a target gun; that the deceased started in the direction of a house nearby; that he saw nothing more of him after appellant himself left the pasture, returning to his home. Witness stated that he went a second time to appellant's home, this time about 1 o'clock of the same day, and found him not at home. Being told that he was at school, he, in company with appellant's father, drove in a buggy to the school house, where they found him. When being asked to go with them in search of deceased, he complied, and all went to the pasture in question. When they reached the pasture, appellant again stated that he had left the deceased near the tank, pointing to the place where he had left him; the place pointed out being about a quarter of a mile distant from the place where the body of the deceased was afterwards found. At the time they were at the pasture and near the tank. Mrs Bulah McGuire and Miss Bulah Black, who lived near said pasture, were also searching for the deceased, and found his body on the hillside some distance from where appellant, in company with his father and deceased's father, then were. They all proceeded to the body, and, reaching there, appellant displayed no emotion at seeing the body of his playmate. Upon being accaused by Mrs. McGuire with being responsible for the death of the deceased, he again denied all knowledge of the killing, stating that a man might have shot him; that he did not fire a gun near where the body was found.

Bulah Black testified that she was in the searching party, in company with Bulah McGuire, and found the body of the deceased upon the hill at a point in plain view of at least two houses near by, and in view of several other houses; that, when she found the body, she immediately notified the father of deceased, who was then in company with appellant and his father and a Mr. Homer in said pasture near by; that they all went to the place where the body was found; and that the accused, upon seeing the body displayed no emotion. This witness corroborates in all important respects the statements made at the scene of the killing as testified to by the father of deceased. Bulah McGuire also testified to substantially the same facts.

A. P. Braudrick, the town marshal, testified, in substance, that he visited the place where the body of the deceased was found, which was within a quarter or half a mile from the corporate limits of Caddo, in the Ainsworth pasture, and described the position of the body as lying on his back with his head south, his left arm by his side, right arm stretched out at right angles with the body; that he found an empty shell of a number 12-guage gun about 30 feet from the body; that appellant was near him when he picked up the shell, saw him pick it up, but said nothing; that from an examination made by him he found the deceased was shot in the left side, and also noticed a mark or ring on his left wrist, about the size of a dime or a little larger; that the ring or circle was black, and looked like a powder mark or burn, the skin was slightly broken in one place, but there was no blood; that he had a conversation with appellant after the body was carried home, and he denied knowing anything about the killing, admitted that he had gone hunting with deceased, but that he had left him at the big gin tank, and that he and his brother, McKinley, went from the tank to the Morris tank. After this conversation appellant and his brother, McKinley, with three other boys of about their ages, were put in the calaboose. After appellant had been imprisoned, the marshall had a further talk with him, and asked him to tell him the truth of the matter; that if he killed the deceased, he wanted to know it, and, if he did not, he wanted to know it; that the prisoner "broke down" and answered that he had killed him, and that he had done it accidentally. He also stated that the dog had jumped a rabbit, and he was trying to shoot the rabbit, but killed deceased. At the time of this confession, appellant and witness were the only persons in the calaboose. Appellant further stated to this witness that at the time he was preparing to shoot the rabbit his thumb slipped off of the hammer and the gun discharged, killing deceased, and that at the time the gun was so discharged his brother, McKinley, was standing nearly in line between him and the deceased, a short distance away. Appellant admitted the shell found by the marshal was from his gun, and was the shell which had contained the fatal shot.

The marshal describing the surroundings where the body was found, said that there was no brush, long grass, or anything else to obstruct the view at that point; that the grass at that particular place was very short, and that the body was found nearly on top of the hill; that at the time appellant made the confession aforesaid his brother, McKinley, was not present, and was not in jail, having been released a couple of hours before, and was at that time down town in charge of Joe Black and A. J. Vaughan, deputy marshals; that McKinley Hinsley, upon being informed that appellant had made a confession about the killing, voluntarily made identically the same statement concerning the killing as did appellant, and being the same statement testified to by both at the trial of this case.

Witness Joe Black testified that he was deputy town marshal, and had the care of and was guarding the boy prisoners, and that all the prisoners excepting appellant were released from the calaboose about 8 or 9 o'clock in the morning, and that from the time McKinley Hinsley was released in the morning until the time of the confession by appellant, as aforesaid, the two brothers had no opportunity of communicating with one another.

Roy Fuller was the next witness for the government, but he swore to no material fact.

William Harriman, a witness for the government, testified that he lived at Caddo during the month of November, 1905, and was acquainted with appellant and deceased; that on the Friday preceding the killing, just after school, appellant and deceased were throwing clods at one another, and seemed angry, and that appellant said, when the boys parted: "I will get you, gol durn you, yet."

Noah Lane, a witness for the government, testified, in substance, that he lived near Caddo in November, 1905; that he remembered the shooting of the Schwartz boy; that he is a barber by trade, and that appellant sometimes blacked boots in the barber shop in which he worked; that appellant was employed in said barber shop three or four weeks before the trial of this case in the court below; that he asked appellant at that time if he killed deceased accidentially, or on purpose, and that he replied: "It did not make any difference. He would get out of it just the same."

The last witness called by the government was Ernest Bagwell, who testified, in substance, that he, with Roy Ridley, were at the calaboose the morning that appellant was confined there; that he was standing outside, near the door of the plank wall surrounding the calaboose; that he heard the voice of a boy outside addressing some one, apparently on the inside of the calaboose, saying. "What are you going to tell them when they come back?" and heard the voice of the boy inside, in answer to the question, say: "I am going to tell them a damn lie, and stick to it." Witness did not see either of the boys, and did not recognize the voices heard.

The record of the United States commissioner's court, containing the testimony of Marshal Braudrick at the preliminary hearing, was offered; and this, with the testimony referred to, constitutes all the evidence offered by the government in support of the indictment herein.

The appellant was sworn, and took the stand in his own behalf. He testified in substance that he was 14 years old on the 26th of January, 1905; that he and deceased attended the public schools at Caddo together; that they were friends and playmates, and that they had planned to go hunting on the day of the killing; that he and his brother, McKinley, and the deceased, went hunting together in the Ainsworth pasture; that on the morning of the day of the killing, as they went to school together, they agreed to go hunting that day after school; that they returned from school before dinner, stopped at the home of deceased, appellant going to his home, ate his dinner, and while there deceased came up in front of the house and hollowed. Appellant coming out of the house, deceased said, "Let's go to town." Thereupon both went to town. Going to a hardware store." They bought a box of shells (cartridges), and a writing tablet at a drug store. After making these purchases, they took the shells to the home of appellant, and that afternoon returned to school together, and went home together after school, the deceased stopping at his home to milk and do up the work before going hunting. Appellant went to his home, and there waited for deceased to come, and, he not coming, appellant and his little brother, McKinley, started for the hunting ground. After appellant had left his home to go hunting, deceased called for him, but was told that he had gone hunting. Soon after appellant and deceased met at the National Bank corner down town, and, when deceased came up to where appellant was standing, he put his hand on his shoulder, and said: "Are you ready?" And deceased, appellant, and his brother, McKinley, started from the bank corner to the hunting ground. But just before leaving the corner they invited a little boy to join them in the hunt, but he did not go with them. The three boys reached the tank, in the Ainsworth pasture, where they amused themselves shooting birds. It was then about sundown. Appellant, being asked just how the shooting occurred, stated:

"We started home then, and went up on top of the hill. Up there, before the accident occurred, the dog commenced jumping up, and I, just before we got there, I say, 'Boys scatter out. He will likely jump a rabbit.' Clarence turned around, and my brother was pretty near between us, and I started to raise my gun and started to cock it, and as I started to raise it the hammer slipped out [defendant hesitates and weeps]. Well, the hammer slipped under my thumb and went off, and shot him."

At the discharge of the gun, deceased was about 10 steps from defendant. Discovering that deceased was shot, appellant went to him, and deceased "died right at once," and that he was not able to speak after the shot was fired; that he stayed there a few minutes after the shooting and then started home; that he asked his brother, McKinley, to tell Mr. Schwartz about the killing, and that he would stay there, and his brother said he would not tell Mr. Schwartz, and said "tell him yourself," but that he did not have the heart to do so, and that he and his brother went as far as the gate to the pasture, climbed upon the gate, stayed there a short time, and went back to the deceased. Remaining there a short time, they went to their home together. He further testified that he and the deceased were good friends and playmates, denied the testimony of Harriman regarding the throwing of clods at one another the Friday before the shooting; that he and deceased had gone hunting before that, and that deceased was about 12 years old; that they played together before and after school, and on Saturdays and Sundays. He admitted upon cross-examination that he had told Marshal Braudrick, Mr. Schwartz, and Mrs. McGuire that he had not done the shooting, and denied knowing anything about it, and said that he and his brother, McKinley, had a talk about the killing, and that they agreed that neither of them could tell it, and that they did not know what to do about it, and, when asked what they made up their minds to do about telling of the killing, he testified that they did not know what to do. He denied knowing anything about the black ring or circle on the deceased's wrist; and denied that while in the calaboose he made the remarks testified to by witness Bagwell. Appellant also testified that he did not have any ill will against the deceased, that he did not shoot him intentionally, and insisted throughout that the shooting was accidental. The cross-examination produced no material change in the testimony of appellant in chief.

The second witness for the defense was Sterile Slack, who testified that he clerked in the hardware store where the boys bought the box of shells, and that they appeared friendly.

Printer Arnold, a witness for appellant, testified that he was a classmate of both appellant and deceased; that they were good friends, played at school together, and heard the boys talk about going hunting the day of the killing; that he never heard of the boys having any trouble; and that they always appeared to be good friends.

Edmund Franklin, a witness for the defense, testified that he was well acquainted with both appellant and deceased; that he had seen them go hunting together twice, saw them together on the day of the shooting, at the bank corner, on their way to go hunting; that appellant asked him to go with them, but he did not go; that he often saw the boys together, and that they always appeared to be good friends, never heard of them having any trouble; and that it was about 4:30 o'clock in the afternoon when he saw appellant, deceased and McKinley Hinsley going hunting together.

The next witness for the defense was Amey Hinsley, an aunt of appellant, who lived at his home. She testified that she was acquainted with the deceased; that she saw him on the afternoon of the day of the killing at appellant's home; that deceased had stopped at the house and asked for appellant, and was told that he was gone hunting. On cross-examination she testified that she was at home at the time appellant returned from the hunt that afternoon, and that he never mentioned deceased; that, when he reached home, he was sick and ate no supper; that his mother "doctored him all night"; that she was at home the evening after the shooting, saw deceased's father there, who stated that his son, the deceased, had not come home the night before; that he asked for appellant, and was told that he was sick in bed; that he went to the room of appellant, but she did not hear what was said between them. This witness also testified on rebuttal for the government that appellant was a bright and intelligent boy.

W. A. Shelby was called as a witness for the defense, but testified to no material fact.

George Russell, a school boy, 16 years of age, was called as a witness for the defense. He testified that he was acquainted with appellant and deceased, often saw them together at school; saw them go hunting together; that they were good friends, never saw them have any trouble, never heard of them having any trouble, saw them on their way to the hunting ground the day of the killing; and that "they were going along friendly."

The last witness called for the defense was McKinley Hinsley, who corroborated his brother, the appellant, in every particular.

This constitutes all the evidence offered by the defense.

Charles E. McPherren, for appellant.

Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for appellee.

BAKER, JUDGE (after stating the facts as above). In harmony with the decisions of appellate courts generally, this court reluctantly disturbs the verdict of a jury upon the ground that the verdict is not supported by, and is contrary to, the evidence. This court will not set aside a verdict where there is a substantial conflict in the evidence. But, when there is no such conflict, and where there is an absence of evidence to support the verdict, it is the duty of this court to set aside the verdict. It is not the purpose of this court to invade the province of the jury in the determination of questions of fact; but in the interest of justice this court will not permit a verdict to stand unsupported by competent evidence. We have carefully read, closely considered, and analyzed all the testimony in this case, and we are unable to harmonize the verdict with the evidence.

It is evident from the reading of the record in this case that the government upon the trial below proceeded upon the theory that a motive for the killing could be supplied by the proof of disagreements or bad blood between appellant and deceased, but the only testimony offered in support of this theory is the statement of the witness Harriman, who said that appellant and deceased on Friday before the killing were throwing clods at one another in front of his house, and that appellant said: "I will get you, gol durn you, yet." The evidence conclusively shows that, if bad blood at that time did, in fact, exist between the boys (which is denied by appellant), friendship and good will was in the meantime fully restored before the following day, for it is undisputed that the boys had been going back and forth from school together, played together, planned a hunting trip together upon the most friendly terms, and, as a very strong and controlling circumstance tending to show no ill will on the part of appellant toward deceased, he not only took his little brother with him, but invited the Franklin boy to join them also. This conduct strongly indicates that appellant had no ill will or hatred toward the deceased at this time, and that he did not intend to injure or kill him. It is unreasonable to believe that, if the accused harbored in his mind a malicious intent to kill or injure the deceased, he would invite witnesses to see the consummation of said intent, and to furnish evidence of his guilt, nor would he take his intended victim upon the hilltop, in plain view of several houses, in daylight, and there injure or kill him. There is absolutely no evidence that there was any change of feeling on the part of appellant toward the deceased between the time they left the Franklin boy a short distance from the hunting grounds, and the time of the killing. There is no evidence of a struggle or fight. The shooting being admitted, it behooved the appellant to make a reasonable explanation of the killing. This he did.

In this case it is claimed by appellant that the killing was accidental, and purely a misadventure. It can be properly claimed that if the testimony tended to show that the accused was satisfied with the result of his act, or conducted himself in such way as to clearly show his approval of the shooting he could not afterwards be heard to say that the killing was accidental or excusable. In this case the conduct of the accused was not commendable. His denying all knowledge of the shooting, and telling conflicting and contradictory stories concerning it, is a serious reflection upon the truthfulness and discretion of the accused, but it does not show his approval of the killing. His conduct after the killing, however, may have formed the basis in the minds of the jury to cause the verdict herein. Was the jury justified in the light of all the evidence? We think not. It doubtlessly would have been better in this case, as in every other case, for the accused to have told the whole truth in the beginning. But we often find persons of mature years, and with much more intelligence and experience in the affairs of life, under circumstances such as prevailed in this case, denying facts and circumstances manifestly in their favor if admitted by them at the time. Would it not, therefore, be unreasonable to expect more from a mere child?

A strong and convincing circumstance that we cannot overlook in this case is found in the fact that the only two eyewitnesses to the killing, namely, appellant and his brother, McKinley, told the same story about the accident when they were separate and apart; and their statements agreed as to the facts concerning the killing, and under conditions showing that it was impossible for them to have agreed beforehand upon the story each should tell. The explanation of the killing, as finally made by appellant and his brother, have convinced us that this was a case of misadventure; and, if they had told the whole truth immediately after the occurrence of the homicide, it is the opinion of this court that the jury would not have rendered a verdict of guilty. In this case the court should have instructed, not upon the law of manslaughter, but upon the law of misadventure. Giving the evidence the most favorable consideration for the prosecution, no more than a mere suspicion or possibility could be inferred therefrom. Believing the rule of law to be that suspicions or possibilities, however strong, are not sufficient to convict of crime; and holding that there must be substantial testimony of the *corpus delicti* to justify a verdict of guilty, and finding no such testimony disclosed by the record in this case, we find that the court below erred in overruling appellant's motion for a new trial; and therefore the judgment of the lower court is reversed, and this case remanded.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

HENRY WESTON v. TERRITORY.

No. 1980, Okla. T. Opinion Filed November 19, 1908.

(98 Pac. 360.)

1. **INDICTMENT AND INFORMATION—Language of Statute.** In an indictment for committing an offense against a statute, the offense may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on the trial.

2. **INTOXICATING LIQUORS—Illegal Sale—Information.** An information or indictment for selling malt, spirituous, or vinous liquors, or any intoxicating drinks, in violation of section 3407, Wilson's Rev. & Ann.

St. 1903, must give the name of the person to whom the sale was made, so that the defendant may know what particular offense he is called upon to defend against.

3. **SAME. An information for giving away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, in violation of section 3407, Wilson's Rev. & Ann. St. 1903, must state the name of the person to whom the gift was made, and the pretext under which the gift was made must also be stated, so that the defendant may know what offense he is required to defend against.**

4. **CRIMINAL LAW—Appeal—Reversal. When an indictment is fatally defective, and there is no testimony in the case tending to show a violation of law, the conviction will be reversed, with directions to dismiss the case.**

(Syllabus by the Court.)

Appeal from Woods County Court; W. T. Wilson, Judge.

Henry Weston was convicted of violation of the liquor law and appeals. Reversed and remanded

On the 13th day of July, 1905, the following information was filed in the probate court of Woods county, Okla. T., against Henry Weston, hereinafter called defendant, and Thomas Fox, viz.:

"Territory of Oklahoma, Plaintiff v. Henry Weston and Thomas Fox, Defendants. Amended information. Comes now Luther Martin, the duly elected, qualified, and acting county attorney, within and for said Woods county, territory of Oklahoma, in the year of our Lord one thousand nine hundred and five, in the name and authority and on behalf of the territory of Oklahoma, information makes: That on the 23rd day of June, 1905, in the county of Woods and territory of Oklahoma, Henry Weston and Thomas Fox did then and there sell at retail and give away malt, spirituous, and vinous liquors, and intoxicating drinks without having obtained a license for the sale thereof, and that said liquors were not made from grapes grown or raised by the said Henry Weston and Thomas Fox on land owned or occupied by them in the territory of Oklahoma, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Oklahoma. Luther Martin, County Attorney."

Said amended information contains the following indorsement:

"Territory of Oklahoma, County of Woods,—ss.: Personally appeared before me the undersigned authority, J. Henry Walker, who, being of lawful age and first duly sworn on his oath, says that he read and knows the statements and allegations contained in the within information, and that the same are true. J. Henry Walker.

"Subscribed and sworn to before me this 13th day of July, 1905. T. D. Nash, Probate Clerk."

On the same day defendant filed his demurrer to said information, which was overruled by the court, to which defendant duly reserved an exception. On the 14th day of July, 1905, the jury returned a verdict finding Thomas Fox, who was jointly charged with the defendant, with the offense named in the information, not guilty, and also a verdict finding the defendant guilty as charged. A motion for a new trial was filed and overruled, and the defendant brought this case to the Supreme Court of Oklahoma Territory by appeal. When the state of Oklahoma was admitted into the Union this case, under the provisions of our Constitution and the enabling act, was transferred to the Supreme Court of the state. Upon the creation of the Criminal Court of Appeals the Supreme Court, as directed by law, transferred the case to this court.

Snoddy & Son, for appellant.—

On the question of sufficiency of information: Compiled Statutes of Nebraska, § 2, c. 50; *Wendt v. State* (Neb.) 49 N. W. 351; *State v. Ball* (Neb.) 43 N. W. 398; *State v. Standish* (Kan.) 16 Pac. 66; *State v. Bernstein* (Iowa) 105 N. W. 1015; *Rector v. Territory,* 9 Okla. 530; *State v. Pischel,* (Neb.) 20 N. W. 848; *Seigel v. People,* 106 Ill. 94; *Young v. State,* 58 Ala. 359; *Gillian v. State,* 47 Ark. 556; *State v. Hutchins,* (Iowa) 36 N. W. 775; *State v. Briggs* (Iowa) 47 N. W. 865; Wilson's Rev. & Ann. St. Okla. 1903, § § 5358, 5365; *Alexander v. State,* 29 Texas; Bishop on Statutory Crimes, § 1037; *Dixon v. State* (Texas) 1 S. W. 448.

W. C. Reeves, Asst. Atty. Gen., for the Territory.—

On the sufficiency of the information: 23 Cyc. 232; Bishop's Criminal Procedure, § 436; Bishops's Statutory Crimes, § 244; Black on Intoxicating Liquors, § 441; *Pettit v. People* (Colo.) 52 Pac. 676; *Boldt v. State,* 72 Wis. 7; *Jordon v. State* (Texas) 39 S. W. 110; *Dahmer v. State,* 56 Miss. 787; *Dant. v. State* (Ind.) 5 N. E. 870.

FURMAN, PRESIDING JUDGE (after stating the facts as above). In view of the disposition which we feel it to be our duty to make of this case, as in all probability it will never be tried again, and as the law upon which the information was based has been superseded by the constitutional and statutory provisions upon prohibition, we do not deem it necessary to do more than discuss and decide the vital questions in the case. These questions are, first, the sufficiency of the information; secondly, the sufficiency of the evidence.

First. In our judgment the information is fatally defective in attempting to charge a violation of law in the matter of selling at retail, or giving away, "malt, spirituous, and vinous liquors and intoxicating drinks" in violation of law. Section 3407, Wilson's Rev. & Ann. St. Okla. 1903, is as follows:

"Any person who shall sell at retail or give away upon any pretext, malt spirituous, or vinous liquors, or any intoxicating drinks without having first complied with the provisions of this act, and obtained a license, as herein provided, shall for each offense be fined," etc. It is seen that to sell at retail under the conditions named in the statute was an offense against the law, pretext or no pretext. But the giving away must have been "upon any pretext," or there was no violation of law. This being a part of the section of the statute creating the offense, the very language of the statute, or words of similar import, must have been used in the information. In *Slover v. Territory,* 5 Okla. 509, 49 Pac. 1010, Judge Tarsney said:

"In criminal cases the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Const. U. S. Amend. art. 6. The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the crime is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that the indictment must furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and also to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For these facts are to be stated and set forth in the indictment with reasonable particularity of time, place, and cir- circumstances. *United States v. Cruikshank et al.*, 92 U. S. 542, 23 L. Ed. 588; Cooley's Const. Lim. 374; Wharton's Crim. Plead. & Prac. 153:"

In *Lawton v. Territory,* 9 Okla. 458, 60 Pac. 94, Judge Hainer said:

"However, all the courts hold that it is necessary to allege, in the indictment or information, every essential element of the crime, and that an indictment or information which fails to do so is bad."

In *Perkins v. Territory,* 10 Okla. 506, 63 Pac. 861, the Supreme Court held that:

"If the charge in the indictment is substantially in the language of the statute, it is sufficient, and the language used should receive its common and ordinarily accepted meaning."

These decisions are in harmony with the overwhelming weight of the decided cases, and with the philosophy of the law, and meet our entire approval.

The statute under discussion was taken from Nebraska. In the case of *State v. Ball,* 27 Neb. 604, 43 N. W. 399, the Supreme Court of that state said:

"The section under consideration was evidently intended to prohibit the sale of intoxicating liquors by those having no license to engage in the traffic. This is the primary object of the law. In order to make the prohibition effective, the Legislature saw proper to provide against its evasion by subterfuge or prtext in giving away, as by the sale of articles of no value, accompanied by a gift of the liquor, or by an ostensible or colorable transaction, by which the liquor could be disposed of without a sale, and yet constitute the principal element of the sale or barter.

Webster in his Unabridged Dictionary defines the word 'pretext' as 'ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearances; pretense.' It was evidently not the intention of the Legislature to make the simple act of giving away intoxicating liquors a crime without reference to the circumstances, necessities, or conditions attending the giving; and therefore the giving of intoxicating liquors, when wholly unaccompanied by an intention to evade the law, is not necessarily a crime. We are strengthened in this view by reference to section 31 of the same chapter (Comp. St 1895, c. 50, § 31), which makes it a crime for any person to treat another or to give away any liquor, beer, wine, or intoxicating beverages whatever, purchased and to be drunk in any saloon, or other public place where such liquors or beverages are kept for sale. If it had been the intention of the Legislature to make the giving away of intoxicating liquors a crime in all cases, then the enactment of the section above referred to would have been wholly useless, as the offense would have been completely covered by section 11 above quoted. If the giving 'was upon any pretext,' for the purpose of evading the law, the pretext, under which it was given would have to be set out substantially in the indictment. The indictment in this case, therefore, did not charge the crime of 'giving away' under the provisions of the section quoted, and did not charge a violation of the law in that particular. We think, also, that the contention of counsel for the district court that the indictment was vague and uncertain, as charging both the selling and giving away, within the meaning of the statute, of the same article of intoxicating liquors, cannot be maintained. As we have seen, in order to constitute a crime, the giving must be upon some pretext for the purpose of evading the law, and the term 'giving away' does not inport such an act. This being true, the allegation of the indictment can charge nothing more than the sale and delivery of the liquor to the person named. That it might have been better pleading to charge in direct terms the sale and delivery of the liquor is perhaps true (although the term 'sale' probably includes both), yet we cannot see that more than this was charged."

In *United States v. Hess,* 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, the Supreme Court held that:

"In an indictment for committing an offense against a statute, the offense may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on trial."

It will not be denied that, in cases of obtaining money or goods under false representations, the indictment or information must not only use substantially the language of the statute in charging the offense, but must go further and give the representations made which are claimed to be false, and also give the name of the party defrauded, and state all of the material details of the transaction. Otherwise is it manifest that a defendant could not prepare to make his defense or plead a judgment, either of acquittal or conviction in bar of a subsequent indictment for the same offense. So in the case at bar the indictment should have given the name of the person to whom the alleged sale was made, and should have alleged that the gift was upon a pretext, and have stated what the pretext was, and the name of the person to whom the pretended gift was made. The necessity for this rule of law is clearly stated in *Dixon v. State,* 21 Tex. App. 520, 1 S. W. 450. The court said:

> "In the case of the offense with which the defendant has been convicted, this rule is particularly applicable, because the accused party may have sold intoxicating liquors to a thousand different persons without, in a single instance, having violated the law. The sales may have been to persons who had proper prescriptions, or the liquor sold may have been for sacramental purposes. How is he to know what particular sale he is to asswer for unless the indictment in some way identifies the sale complained of by the state as a violation of law? Must he come prepared to prove the legality of each of the thousand sales he has made? To require this would be unreasonable and oppressive. It is not unreasonable to devolve upon the state the not difficult duty of informing the accused which one of the sales made by him is complained of as unlawful. We think that he is entitled to this information, and because in this case the indictment did not afford such information, it is uncertain and bad, and the trial court erred in overruling the exception to it, for which error the judgment is reversed, and because the indictment is defective in the matter of substance, the prosecution is dismissed."

We fully concur in the views expressed in these authorities.

Second. Upon an examination of the evidence we find that there is not a particle of testimony of any sale. There is evidence of the defendant having given away intoxicating drinks, but there is no evidence of "any pretext," or that such giving was a subterfuge to evade or defeat the law. For these reasons the trial court erred in not sustaining defendant's demurrer to the indictment, and also erred in orerruling defendant's motion for a new trial. While this court is anxious to sustain the proceedings in trial courts, it can only do so when they are in conformity with the law.

This judgment is therefore reversed, and the cause remanded, with directions to the trial court to sustain defendant's motion for a new trial and his demurrer to the information, and dismiss the prosecution and discharge the defendant.

BAKER and DOYLE, JUDGES, concur.

Ex parte CHARLES JOHNSON.

No. A26. Opinion Filed November 19, 1908.

(98 Pac. 461.)

1. **HABEAS CORPUS—Jurisdiction—Courts.** The Criminal Court of Appeals, the Supreme, district and county courts, and the justices and judges thereof, have concurrent original jurisdiction in habeas corpus.

2. **SAME—Commitment—Inquiry Into Validity—"Process Issued Upon Final Judgment."** An order of commitment to hold for trial, issued by a magistrate before whom a person is brought for examination upon a felony charge, after such examination is concluded and a finding made, that there is sufficient cause to believe defendant guilty of a felony, is not "a process issued on any final judgment of a court of competent jurisdiction."

3. **SAME—Scope of Inquiry.** Before indictment or information filed, the duty of the court or judge upon habeas corpus hearing is similar to that of the magistrate upon the preliminary examination, and determines only the particular restraint complained of, and is not necessarily final.

4. **SAME—Successive Applications.** An order of a district judge remanding a prisoner on habeas corpus does not preclude him from making application to this court for habeas corpus. The constitutional right of the writ is not exhausted by the first remanding order.

5. **SAME—Jurisdiction—Courts.** In habeas corpus proceedings the Criminal Court of Appeals is a court of original jurisdiction.

6. **SAME—Grounds of Relief—Want of Evidence.** Where there is no legal or competent evidence to sustain it, an order of commitment is void.

7. **SAME—Murder—Evidence—Sufficiency.** Where there is evidence to connect a petitioner charged with murder with the time, place, and motive for killing, the writ will be denied, and petitioner remanded.

(Syllabus by the Court.)

Original application by Charles Johnson for *habeas corpus* and for certiorari in aid thereof. *Habeas corpus* denied, and petitioner remanded to the custody of the sheriff.

This is an original proceeding in this court for a writ of *habeas corpus* and for a writ of certiorari in aid thereof. The petition was signed and verified by the petitioner, and, omitting the formal parts, was as follows:

"Your petitioner, Charles Johnson, most respecfully represents to your honors that he is now illegally and unlawfully restrained of his liberty and detained by M. B. Louthan, sheriff of Grady county, Okla., in the county jail at Chickasha, in said county and state; that he is held in custody by virtue of a certain commitment issued by James M. Davis, a justice of the peace in and for Union township, Grady county, Okla., upon a charge of murder. A copy of said commitment is hereto attached and made a part of this petition, marked 'Exhibit A.'

"Your petitioner states that heretofore, to wit, on or about the ———day of September, 1908, he was arrested upon a warrant issued by said justice of the peace, based upon a certain complaint made against him and one E. P. Slade and Fred Wilkinson, charging them with the crime of murder of one Sam Potter, on the 12th day of September, 1908; that he was thereafter carried before said James M. Davis, justice of the peace aforesaid, for the purpose of having an examining trial, and the state introduced its testimony and evidence, and the dedendants their testimony, and as a result of said examining trial said defendant was committed and incarcerated in jail, without bail, upon the charge of murder, as aforesaid. A copy of said warrant is hereto attached and made a part of this petition, marked 'Exhibit B.'

"Your petitioner further avers that there was no competent or legal evidence introduced at said trial before said James M. Davis, as aforesaid, in any way connecting your petitioner with the said crime of murder for which he was charged, and no evidence introduced upon and from which the said James M. Davis, justice of the peace, aforesaid, could judicially determine that there was reasonable ground or probable cause to believe your petitioner guilty of said crime of murder as aforesaid, and said commitment issued by said James M. Davis, as aforesaid, was without authority of law and exceeded the jurisdiction of said justice of the peace, and therefore the same is null and of no force and effect.

"Your petitioner further states that on, to wit, the——— day of September, 1908, he together with the said E. P. Slade and Fred Wilkinson, presented their petition to the Honorable Frank M. Bailey, district judge of the Fifteenth judicial district, Okla., together with a true and correct copy of all the testimony and evidence taken before the said James M. Davis in the examining trial as aforesaid for a writ of *habeas corpus,* and, after consideration of said petition and the evidence attached thereto, the said Honorable Frank M. Bailey, as aforesaid, made an order allowing your petitioner and the other parties charged with said murder bail in the sum of $1,000 each, but in said order held that there was no evidence connecting your petitioner and the other defendants with said crime, except in a few indirect circumstances.

"Your petitioner states that said Honorable Frank M. Bailey, as aforesaid, committed grevious errors in refusing to grant said writ of *habeas corpus* absolutely, and under the said decision made by the said Honorable Frank M. Bailey your petitioner was entitled to his liberty and to be discharged from custody. A copy of said order made by said district judge, as aforesaid, is hereto attached and made a part of this petition, marked 'Exhibit C.'

"Your petitioner further states that he was and is unable to execute said bond in the sum of $1,000, as aforesand, and that by reason thereof, and by reason of the facts herein alleged, he is still deprived of his liberty unlawfully and without any legal authority.

"Your petitioner alleges that he is entitled to have a writ of certiorari issued by this court, directed to the said Honorable Frank M. Bailey, as aforesaid, commanding him to send up the record, including the petition and the exhibits thereto, including all the evidence introduced on said hearing, in order that this honorable court may examine into the unlawful imprisonment of your petitioner, as alleged herein.

"Wherefore your petitioner prays that this honorable court grant him a writ of *habeas corpus* herein, and a writ of certiorari directed to the said Honorable Frank M. Bailey, district judge, as aforesaid, to the end that his unlawful imprisonment may be inquired into, and that he may be discharged from said unlawful imprisonment and restored to his liberty, and will ever pray.

"F. E. Riddle, Attorney for Petitioner."

Omitting Exhibits A and B, Exhibit C of said petition was as follows:

"Exhibit C.

"In the District Court in and for the Fifteenth Judicial District, Grady County, Oklahoma.

"*In re* the Application of Charles Johnson, for Writ of *Habeas Corpus.* Order Admitting to Bail.

"Now at this time came on to be heard upon evidence before the committing magistrate and additional evidence and application and petition of Charles Johnson for writ of *habeas corpus* before the undersigned district judge, and he, being well and sufficiently advised in the premises, is of the opinion that said defendant is illegally restrained of his liberty and entitled to bail, and it appearing to the undersigned district judge from the record herein that there is no legal and competent testimony connecting said petitioner with the crime for which he is charged, except indirect circumstances, and that he should be admitted to bail in the sum of $1,000, it is therefore considered and ordered by the undersigned district judge that said petitioner, Charles Johnson, be and he is hereby admitted to bail in the sum of $1,000, and upon the execution of said bail, with sufficient security, as required by law, the sheriff of Grady county is hereby ordered and directed to release said petitioner from his custody and restore him to his liberty under said bond.

"Witness my hand this the 10th day of October, 1908.

"Frank M. Bailey, District Judge."

On the 24th day of October, 1908, writs were allowed as prayed for in said petition, returnable the 27th day of October, 1908, at which time respondent filed his return showing that he held said petitioner by virtue of a commitment issued, as alleged in said petition, and there was also filed in this court the record of said cause, as shown by an agreed statement filed therewith, which is as follows:

"It is hereby agreed by and between attorney for petitioner and B. B. Barefoot, county attorney, that the above and foregoing contains a true and complete record of all the evidence, testimony, and orders made in the *habeas corpus* proceeding before Hon. Frank M. Bailey in said cause, and contains all the evidence considered by said district judge. F. E. Riddle, Attorney for Petitioner. B. B. Barefoot, County Attorney."

The attorney for petitioner also filed a waiver of the presence of the petitioner, and submitted the cause on the petition, the return, the record, and the evidence under the agreed statement.

F. E. Riddle, for petitioner.

B. B. Barefoot, County Atty., and *W. C. Reeves,* Asst. Atty. Gen., for respondent.

No briefs came to the hands of the reporter.

DOYLE, Judge. (after stating the facts as above). It is alleged by petitioner that his restraint is illegal and unauthorized. first, because the magistrate who issued the warrant and commitment acted without authority of law, and exceeded the jurisdiction of a justice of the peace in so doing. The petition, with the exhibits and the return as made, shows that the complaint and warrant were proper in form, and the commitment was regular on its face. The Constitution of the state provides (article 7):

"Sec. 18. The office of justice of the peace is hereby created, and, until otherwise provided by law, courts of justices of the peace shall have, co-extensive with the county, jurisdiction as examining and committing magistrates, in all felony cases."

Thus it appears that the justice of the peace as an examining magistrate had jurisdiction of the person and of the crime charged, and did not act beyond the power conferred upon him by the Constitution as such officer. This contention will be, at best, a mere conclusion of law, unless it is based upon the alleged want of probable cause. In support of this contention, petitioner alleges that the district judge of the Fifteenth judicial district, Okla., upon a hearing had before him, determined and found that there was no evidence adduced at said preliminary examination, connecting petitioner with the crime charged. The record shows that subsequent to said commitment, and upon an application therefor made by petitioner to Hon. Frank M. Bailey, district judge of the Fifteenth judicial district, Okla., a writ of *habeas corpus* was allowed by said district judge, commanding the sheriff of Grady county to make return to said writ, and bring the petitioner before said district judge. In obedience to the writ, the petitioner was brought before Judge Bailey, and the cause of his arrest and detention was inquired into and considered, and thereupon said district judge made the findings and order as shown by Exhibit C of the petition herein.

In the outset of our inquiry and investigation we are confronted with section 4867, Wilson's Rev. & Ann. St. (chapter 66. art. 30 § 669), as follows:

> Sec. 669. No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: * * * Second, upon any process issued on any final judgment of a court of competent jurisdiction; or (fourth) upon a warrant of commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information."

Construing a statute identical in its language, Chief Justice Horton in the case of *In re Snyder,* 17 Kan. 552, says:

> "An order of commitment to hold a prisoner for trial, issued by a magistrate before whom a person is brought for examination, upon a charge of having committed an offense, after such examination is concluded, and a finding made that it appears that the prisoner is guilty as charged in the complaint and warrant, is not 'a process issued on any final judgment of a court

of competent jurisdiction,' nor is such a commitment included in any process named in No. 671 of the Code. Hence there is no prohibition in said section to prevent a court or judge from inquiring into the legality of the imprisonment of a person under a commitment of an examining magistrate."

We think the rule announced by Chief Justice Horton is correct. It is certainly in point. Section 4868, Wilson's Rev. & Ann. St. 1903 (chapter 66, art. 30, § 670) is as follows:

"Sec. 670. No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases, the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail or recommit the prisoner, as may be just and legal, and recognize witnesses when proper."

The Supreme Court of Oklahoma in the case of *Ex parte Stevenson*, 20 Okla. 549, 94 Pac. 1071, opinion by Justice Kane, says:

"In the record before us it would seem that the question of former adjudication was not raised in the application for writ of *habeas corpus* before Judge McMillan, but that the case was there presented upon the evidence, and Judge McMillan found against the petitioner. Under the common law administered in England, if one judge refused to discharge a prisoner on the writ of *habeas corpus,* he could appeal to another, and so on, until he had taken the opinion of all the judges accessible We do not want to be understood as adopting or rejecting the common-law rule, or as passing upon the effect of the judgment of Judge McMillan as an estoppel to an original application for a writ of *habeas corpus* before this court. It is true that the same evidence that was presented to Judge McMillan is before us as an exhibit to the petition, but still, where a case has already been once heard upon *habeas corpus* and the prisoner has been remanded, another court will not always deem it expedient to grant another writ and hear the case again on the same evidence. Church on Habeas Corpus, 187. The writ of *habeas corpus* is denied, and the petitioner is remanded to the custody of the sheriff of Cleveland county, state of Oklahoma."

In this case the conclusion only is concurred in by the other members of the court, and the learned justice who rendered the opinion leaves it an open question whether the finding and order of the district judge is *res adjudicata*, to be reviewed on appeal only.

Under the foregoing provisions of our statutes and the decision last quoted, the question is presented whether this court is prohibited in proceedings by *habeas corpus* from examining the proceedings or record of a lower court in the cases mentioned, or whether petitioner's remedy is only by appeal to this court. In determining the construction to be given to these provisions, we are mindful that the great object and purpose of the writ of *habeas corpus* is the liberation of those who may be imprisoned without sufficient or probable cause. It is the most simple and speedy remedy. *Habeas corpus* is the great prerogative writ, and is the best protection and most efficient security of personal liberty known to the law. Its history is lost in antiquity. It was in use before, but the first royal recognition of it is found in Magna Charta. It was guaranteed to our English ancestors by the *habeas corpus* act of 1679, and came to us as a part of our inheritance from the mother country. It was secured to the citizen by that part of article 1, § 9, Const. U. S., which provides: "Sec. 9. The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety might require it." And that part of article 14 of the amendments to the Constitution of the United States which provides that no person shall be deprived of life or liberty "without due process of law."

Justice Tarsney in the case of *In re Patswald*, 5 Okla. 790, 50 Pac. 142, commenting on this provision of the federal Constitution, says:

"This writ cannot be abrogated or its efficiency curtailed by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment of the organic law, be placed beyond its reach and remedial action. Its privileges cannot be even temporarily suspended, except for the safety of the state in cases of rebellion and invasion. Const. art. 1, § 9. That provision of the Constitution is a guaranty that the right of the writ of *habeas corpus* should remain as it existed at the common law, and should not be curtailed by legislative enactment or by subtle and metaphysical judicial interpretation, and Legislatures can no more prevent its application to cases where it would have been applicable at common-law than they can abrogate the right of trial by jury."

It is secured to the people of Oklahoma by section 10 of the Bill of Rights, which is as follows: "Sec. 10. The privilege of the writ of *habeas corpus* shall never be suspended by the authorities of this state." The great and leading intent of our Constitution in respect to the writ of *habeas corpus* is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. By virtue of this broad and comprehensive provision in the Bill of Rights, and the existing statutes, it is a writ of right; and this court, the Supreme Court, the district and county court, and any justice or judge thereof has power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in jail who is in custody in violation of his rights under the Bill of Rights. The Constitution or the laws of the state, and the court, justice, or judge to whom the application is made, shall forthwith allow a writ of *habeas corpus,* unless it appears from the petition itself that the petitioner is not entitled thereto.

While all courts of record have concurrent original jurisdiction a district court or the judge thereof, except as provided by article 25, c. 68, Wilson's Rev. & Ann. St. 1903 (section 5764), can only grant, issue, and determine the writ upon the petition of a party confined in that respective district; and a county court, or judge thereof, can only grant, issue, and determine the writ upon the petition of a party confined in that particular county. Section 4866, Wilson's Rev. & Ann. St. 1903, provides as follows:

"(1) The court, or judge, shall thereupon proceed in a summary way to hear and determine the cause; and if no legal cause be shown for the restraint, or for the continuance thereof, shall discharge the party."

And in all cases of commitment on a criminal charge the duty of the court or judge thereof upon such hearing is similar to that of the magistrate upon a preliminary examination; and, though the prisoner may be discharged, he may again be arrested for the same offense upon a sufficient showing. While the decision of the court or judge may liberate the prisoner from imprisonment, it does not determine his innocence. He may be charged, tried, and convicted without regard to his discharge upon the writ of *habeas corpus.* Upon such a hearing the guilt of the prisoner of the crime charged or of the right to rearrest him in consequence of it, cannot be finally determined. The order of his discharge simply releases him from the particular restraint to which he is subjected. Such a decision cannot convict him or acquit him of the crime charged. It is not final.

The *habeas corpus* statutes of this state are embodied in the Code of Procedure Civil (chapter 66, art. 30) and the Code of Procedure Criminal (chapter 68, art. 25), Wilson's Rev. & Ann. St. 1903. The provisions above quoted permit the decision of examining magistrates to be reviewable upon *habeas corpus;* otherwise, the *habeas corpus* articles contain no provision for appeal. It is elementary that the right of appeal is a statutory right, and this rule is especially applicable in *habeas corpus* cases.

The courts of several states have held that the decisions in *habeas corpus* cases are not reviewable under a general law allowing an appeal from all final judgments. See *Howe v. State.* 9 Mo. 690; *Ex parte Toney,* 11 Mo. 662; *Ex parte Jilz,* 64 Mo. 205, 27 Am. Rep. 218; *Carruth v. Taylor,* 8 N. D. 166, 77 N. W. 617; *People v. Conant,* 59 Mich. 565, 26 N. W. 768. In some states the right of appeal has been expressly granted by legislative enactments; in other states the courts hold that a decision in a *habeas corpus* proceeding is appealable under a statute which gives an appeal from a final order affecting a substantial right made in a special proceeding. See *State v. Buckham,* 29 Minn. 462, 13 N. W. 902, and *Winton v. Knott,* 7 S. D. 179, 63 N. W. 783. By virtue of a provision of section 21 of the "Enabling Act" (Act June 6, 1908, c. 3335, 34 Stat. 277) all laws in force in the territory of Oklahoma at the time of the admission of Oklahoma as a state were extended over and put in force throughout the state, except as modified or changed by the "Enabling Act," or by the Constitution of the state. Thus the adoption of the *habeas corpus* statutes of the territory of Oklahoma was only so far as the same were not repugnant to, or in conflict with, the Constitution of the state. Had it been intended to provide for appeals in *habeas corpus*, some appropriate provision would have been made. Its omission affords the best evidence to the contrary, and, if anything is wanting to remove all doubt, it will be found in the nature and object of this great writ as a Constitutional right; its purpose being to afford a speedy remedy to a party unjustly accused of the commission of a crime without obstructing or delaying public justice, both of which objects would be defeated by the delays consequent upon an appeal. Any other rule would operate practically to subvert the constitutional safeguards and the fundamental rights of the citizen. Section 12 of the act creating the Criminal Court of Appeals (Laws 1907-08. p. 293) provides:

> "Sec. 12. Said court and judges, shall have the power to issue writs of *habeas corpus* and under such regulations as provided by law, issue such writs as may be necessary to enforce its own jurisdiction."

Under this section this court exercises original, and not appellate jurisdiction. It is well settled that regulative restrictions of the constitutional privileges of the writ must receive a liberal interpretation at the hands of the courts, with a view of giving the petitioner the full benefits of his constitutional right to the writ.

It is our opinion that under the power with which this court is invested by the Constitution and laws of this state any person restrained of his liberty within the state has the right to invoke the original jurisdiction of this court on *habeas corpus*. And, while a judgment remanding the party on a writ of *habeas corpus* is not subject to review on a writ of error or appeal, it is entitled to some consideration on a second application, and may warrant the refusal of the second application. In the case at bar, and in all cases where the petitioner on application to a district court, or judge thereof, has been remanded, we are of the opinion that the constitutional right of the party to the writ was not exhausted by the first remanding order, and the petitioner has the right to present his application to this court, as has been done in this case. We believe any other construction of the statute would render it unconstitutional, as unduly infringing upon the powers given to the courts to issue writs of *habeas corpus.*

After an indictment it has never been the practice of courts to look into the question of guilt or innocence on *habeas corpus;* the rule being well stated in the case of *Ex parte Patman,* 20 Okla. 846, 95 Pac. 622. The opinion of the court was rendered by Chief Justice Williams, wherein he says:

"The relator being in custody by the sheriff of Muskogee county to answer an indictment pending and undetermined in the district court of said county for the crime of murder, a writ of *habeas corpus* is prayed for by relator, not that he may be enlarged on bail, but it is claimed by him that he is entitled to an absolute and unconditional discharge from custody. * * * An application for a *habeas corpus* for the purpose and under the circumstances for which this was made, is certainly novel and without precedent in the courts of this state. It would seem to have long since been much too well established by the common law as well as our statutes that an indictment not void upon its face, regularly returned to, and pending in a court having jurisdiction thereof, could only be disposed of by some appropriate proceeding in such court for an experiment such as the present. The practice of common law in the Court of King's Bench is thus stated in Wilmot's Opinions, 106 (Hurd on Habeas Corpus 331): 'In imprisonment for criminal offenses the court can act upon it only in one of three manners: (1) If it appear clearly that the act for which the party is committed is no crime, or that it is a crime, but he is committed for it by a person who has no jurisdiction, the court discharges. (2) If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction, or if it appears to be a crime, but a bailable one, the court bails him. (3) If an offense, not bailable, and committed by a competent jurisdiction, the court remands or commits him.' It is certainly essential to the proper discharge of its duties, and the due and efficient administration of the law, that whenever a court assumed to act in a manner and over parties within its jurisdiction it is its right and duty to proceed to its final determination without interference from any other tribunal. The writ of *habeas corpus* was not designed to operate as a writ of error or certiorari, and does not have their force and effect. It does not deal with error or irregularities which render proceedings voidable merely, but such only as render them absolutely void."

The sole purpose of the certiorari in this case was to produce the record under which the commitment was originally made and upon which the district judge based his findings. However, we believe the proper practice is to require petitioner in this character of cases to produce and make a part of his petition the evidence taken at the preliminary examination.

This brings us to the principal, and probably the real, question in this case: Was there any legal evidence adduced to prove, or tending to prove in any manner, that there is sufficient cause to believe petitioner guilty of the offense charged? If there was no such evidence, the justice of the peace could not make a legal commitment, because, where there is no evidence to sustain it, the commitment is void. If there is no legal and competent testimony connecting petitioner with the crime for which he is charged, as found by the district judge, then the petitioner should be discharged. We have carefully read and reviewed the testimony as shown by the transcript. The testimony shows that one Sam Potter, residing at Minco, Grady county, Okla., was on the night of September 12, 1908, between the hours of 9 and 10 o'clock, foully murdered upon the front porch of his home in said city by having his skull crushed with an iron bar. His body was found lying on the porch with an iron bar beside it. There was no direct testimony as to who committed the crime, but there were circumstances which might well tend, in connection with other facts, to induce a belief in petitioner's guilt. We are constrained to hold that substantially the proof is almost positive that petitioner has guilty knowledge. The evidence against him, we must admit, is not as strong as it might be, and the inference of guilt does not flow from the circumstances with such an absolute and irresistible certainty as we sometimes find, but still the evidence was sufficient to put petitioner upon his defense. It will not be necessary to notice it in detail. The testimony tends to show that the deceased was the victim of a conspiracy, and within the hour preceding the finding of his dead body petitioner, together with three other persons, consulted near his home regarding money held by deceased, and that petitioner, being one of the number, was directed by his confederates to secure this money from deceased. It further shows that deceased, together with petitioner and his co-defendants, was engaged in questionable, if not criminal, transactions on the day deceased was killed. The testimony further shows that petitioner was seen by several witnesses leading deceased towards his home shortly before the murder was committed. An effort was made, as shown by the testimony, to prove an alibi, but the petitioner or his codefendants did not testify. We deem it sufficient to mention these circumstances which tend, in connection with other facts shown, to prove the guilt of petitioner. The foregoing incriminating circumstances are shown by competent testimony, and not by illegal, incompetent, irrelevant, hearsay, opinion, or secondary evidence. We will not further comment upon the evidence, as we do not desire that our comments should in any way influence the final trial.

Justice Kane in the case of *In re Thomas et al.*, 20 Okla. 167, 93 Pac. 980, in a well-considered opinion, states the rule to be that "the burden of proof is on the petitioner in a capital case to show that he is illegally deprived of his liberty." The reasoning and the rules enunciated therein appeal to, and meet the approval of, this court.

It is the opinion of this court, applying the rules herein enunciated to the facts and circumstances as shown by all the evidence before us, the petitioner is not unlawfully restrained of his liberty, and that respondent, the sheriff of Grady county, Okla., properly and legally holds said petitioner.

The writ of *habeas corpus* is therefore denied, and the petitioner, Charles Johnson, is hereby remanded to the custody of the sheriff of Grady county, Okla.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

STATE *ex rel.* SIMS v. CARUTHERS, *Judge.*

No. 410. Opinion Filed November 19, 1908.

(98 Pac. 474.)

1. **MANDAMUS—Other Adequate Remedy.** A peremptory writ of mandamus will be denied where the petitioner has a plain and adequate remedy in the ordinary course of the law.

2. **CRIMINAL LAW—Trial—What Law Governs.** The law in force in the Indian Territory at the time the indictment was returned against the accused shall govern the trial and disposition of such case.

3. **CRIMINAL LAW—Public and Speedy Trial—Constitutional Provisions.** The provisions of the sixth amendment to the Constitution of the United States, guaranteeing the accused a speedy public trial, were applicable to the Indian Territory.

4. **MANDAMUS—Office of Writ—Dismissal of Criminal Action.** The writ of mandamus is a proper remedy to enforce the dismissal of a criminal action where the right to a speedy trial has been denied, in cases where the delay is caused by the abuse of discretion by the trial court.

5. **CONSTITUTIONAL LAW—Ex Post Facto Law.** No ex post facto law will be enforced against the accused which would in any way be prejudicial to his rights.

6. **MANDAMUS—Parties Plaintiff—Use of Name of State.** In mandamus proceedings to enforce a private right, the real party in interest should be named as plaintiff, and such proceedings should not be entitled in the name of the state on the relation of such party.

7. **STATUTES—Construction—Statute Adopted from Another State.** Whenever Congress, in legislating for the Indian Territory, borrowed from the statutes of a state provisions which had received in such state a known, defined, and settled construction before such act of Congress was passed, that construction should be deemed to have been adopted by the courts over which such legislation extended; and the provisions of such laws should be construed as they were understood at the time in the state from which the same were borrowed.

8. **CRIMINAL LAW—Trial—"Speedy Trial."** By a speedy trial, as provided for by sections 2192 and 2193 of Mansfield's Digest of the Laws of the State of Arkansas, is meant a trial conducted according to the fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and causeless delays caused or brought about

by the officers of the state or county upon whom devolves the duty of the prosecution and determination of criminal cases; and, unless good cause to the contrary is shown, every person indicted for crime under the law in force in the Indian Territory prior to statehood is entitled to be tried before the end of the third term of the court, in which the indictment is pending, held after the return of the indictment, unless the delay happens on the application of the accused.

(Syllabus by the Court.)

Original action in mandamus by the state, on the relation of Bunner Sims, against John Caruthers, judge of the Ninth judicial district. Mandamus denied.

This is an original action in mandamus, brought in this court under the provisions of section 12, art. 1, c. 28, p. 283, of the Session Laws of the state of Oklahoma passed in the year 1908 (Laws 1907-08), and article 33, c. 66, Wilson's Rev. &. Ann. St. Okla. 1903.

Relator was indicted by the grand jury of the United States District Court in and for the Western District of Indian Territory, at the February, 1907, term of said court, sitting at Okmulgee, in three cases, charging him with the crime of assault with intent to kill. Under the terms of the enabling act and the Constitution of the state of Oklahoma, the district court of Okmulgee county became the successor of the United States District Court of the Western District of Indian Territory for the trial of all criminal cases then pending in said United States Court for the Western District of Indian Territory at Okmulgee.

The relator, by his attorneys, Messrs. Stanford & Cochran, on the 5th day of October, 1908, filed his petition and motion for a writ of mandamus in this court, alleging that, at the February, 1907, term of the United States Court in and for the Western District of Indian Territory, sitting at Okmulgee, three separate indictments were found and returned against the relator by the grand jury of said court, charging the relator with the crime of assault with intent to kill, and being numbered in said court, respectively, Nos. 993, 994, and 995; the first, charging an assault with intent to kill Lucy Yahola; the second, assault with intent to kill Peggie Scott; and the third, assault with intent to kill John Tiger. That since said February, 1907, term of said court, two other and subsequent terms of said United States Court for the Western District of Indian Territory have been holden at Okmulgee, in said district; that is to say, the May, 1907, term, and the November, 1907, term. That since the 17th day of November, 1907, there have also been holden three terms of the district court in and for the Ninth judicial district of the state of Oklahoma, for Okmulgee county, to wit: The December, 1907, term; the January, 1908, term; and the April, 1908, term. Said terms were regularly fixed by order of the Supreme Court of this state. That relator was, at the February, 1907, term of the United States Court for the Western District of Indian Territory, admitted to bail; and that since said term of court he has been, and now is at liberty, upon bond for his appearance at the district court for the Ninth judicial district of the state of Oklahoma; that five separate terms of court have been held since the said February, 1907, term of said United States Court for said district, at any of which terms the relator might have been placed upon trial for any and all of the offenses charged against him in said indictments. That no effort of any kind was made by the prosecution to bring either, or all, of said cases to trial; and that relator has been present at each and every term of said courts. That at the April term of said district court of the Ninth judicial district of the state of Oklahoma, for said county, the relator filed in open court his motion in writing praying that he be given a trial upon all of said indictments against him, or that, failing to bring said cases to trial, the court enter an order dismissing each of said cases, and that he be discharged. That this motion was heard in open court, before the defendant herein as presiding judge of said court. That the county attorney of said Okmulgee county made no showing whatever as to the reasons for the delay in bringing said charges against relator to trial at said term, or any term prior thereto, and, that no evidence was introduced showing cause for delay in bringing the relator to trial upon said indictments. That the criminal calendar for the September, 1908, term of said district court has been set, and there appears on said calendar all of the cases above enumerated against relator, and that said cases are set down for trial in said court. That none of the delays in the trial of said cases were caused by the relator. That he has, at all times, been ready for trial, and that none of the delays have been at the request of either the relator or his attorneys. That none of the delays have been occasioned by want of time on the part of the court to try said cases, or either of them; and that at each of said terms of said courts other and less important business has been disposed of, including the trial of many civil cases. Relator prays that a peremptory writ of mandamus issue from this court, directed against the Honorable John Caruthers, judge of the district court of the Ninth judicial district of the state of Oklahoma, commanding him to dismiss the three separate cases pending in said court against the relator. Relator filed in this court, in support of his petition and motion, the affidavit of the Honorable H. E. P. Stanford, one of his attorneys, in which he swears the facts stated in the petition herein are true.

To this petition the defendant, on the 5th day of October, 1908, filed his answer, under oath, in substance as follows: That he admits as true that said relator was indicted, as averred in his petition herein, and that two terms of said United States Court for the Western District of Indian Territory had been held in said district prior to the admission of this state into the Union; that by operation of law the district court of the Ninth judicial district, state of Oklahoma, became the successor of the United States Court for the Western District of Indian Territory, in so far as the cases of the United States against the relator are concerned; and that three terms of the district court of the Ninth judicial district of the state of Oklahoma have been held at Okmulgee since the admission of the state into the Union. And, further answering, defendant says: That while three terms of said last-named district court had been fixed and set for said county, only two terms were held wherein it would have been possible for relator's cases to have been tried for the reason that the first term of said court, which was set for December, 1907, was for the purpose of getting the machinery of the state courts in said county in operation, and that at this term no jury was summoned, nor was the relator present. That at the January, 1908, term of said court, there was pending on the docket of said court, in said county, a large number of criminal and civil cases, amounting to several hundred of each. That it was a physical impossibility, and beyond the power of mental achievement, to have disposed of all such cases which were then pending in said court at Okmulgee, including the relator's cases, during the time allotted by order of the Supreme Court for said term in said county. That the records of said court show that the witnesses on behalf of the state were subpœnaed in relator's cases to be present at said court at Okmulgee on February 10, 1908, being the day on which relator's cases were set for trial in said court. That on February 10, 1908, the petit jury, which had been summoned to serve for said term, was discharged by order of said court on account of an epidemic of smallpox at that time prevailing in the town of Okmulgee ; that it was deemed necessary to preserve the public health and safety for said jury to be so discharged. That the records do not show that relator was present at said term, ready and demanding trial of his cases; nor does it show that he objected to the discharge of the jury. That at the January, 1908, term, relator's attorney, Hon. H. E. P. Stanford, was a member of the Senate of the State of Oklahoma, and was only present at said term of court one or two days, and was not present on February 10, 1908, the day relator's cases were set down for trial, and that neither said attorney nor relator wanted a trial, or were ready for trial on said date. Respondent denies that at the April, 1908, term of said district court, the motion demanding a trial by relator was argued in said court, or that said court refused to enter an order of record, either dismissing him or overruling said motion. That, under a rule of said court, the hearings of motions were held on Saturdays and Tuesdays of each week during the term of said court. That the filing of all motions is noted by the clerk on the appearance or motion docket of said court, and the party desiring to have the same considered by the court must give notice to the opposing party in writing not later than 12 o'clock noon the day preceding the motion day upon which such motion is to be heard. That on the day relator's motion was filed the said court was engaged in the trial of a murder case, and that said case consumed about nine days of said term. That there are pending on the docket of said court for Okmulgee county hundreds of criminal and civil cases; that, in addition to Okmulgee county, there are three other counties within said judicial district; that in all of said counties the business of said court is very heavy; that he is the only judge presiding for said judicial district, and that as much business has been disposed of in said court as was possible; that relator's cases have not been disposed of for want of necessary time to do so, that his cases are set down upon the trial docket of said court for Tuesday, October 7, 1908; that relator can then get a trial of said cases if he so wishes; and that the relator has not been prejudiced.

In support of respondent's answer herein is offered a certified copy of the record of said courts pertaining to the action of said courts in the cases of the relator, also the verified statement of Joe Eaton, county attorney of Okmulgee county, and the certificate of U. T. Whitmer, district clerk, certifying that at the opening of the September, 1908, term, there was pending in said court 419 criminal cases and 499 civil cases, and that there was filed in said court since the 16th day of November, 1907, more cases, both civil and criminal, than it has been possible to try

To the answer of respondent, relator files reply, in substance, as follows: He admits that no jury was summoned at the December, 1907, term, but urges that the relator should not be prejudiced in his rights, because the Supreme Court of the state had designated said December term as a regular term of said court, and a jury could have been summoned. He admits that the fourth paragraph of respondent's answer sets forth the facts concerning the number of civil and criminal cases pending in said court at that time, but says that among the cases disposed of at said term were many of more recent date and less important than the cases of the relator; admits that the jury was discharged, as set forth in paragraph 5 of respondent's answer, but alleges that at said term many cases of later date and less importance were disposed of than those pending against relator; that ample time was had for the trial of relator's cases before the jury was discharged. That the motions of relator were not separately argued, but that a similar motion was argued in said court in a case pending against one Joe Hill, and that by agreement the argument made in the Hill Case was to apply to the cases of relator, and that upon the same record proof the cause against said Hill was dismissed; but that the said court failed and refused to dismiss relator's cases.

Exhaustive briefs were filed by both parties, and the case was fully and ably argued by counsel on both sides.

Before deciding this case, we desire to call attention to the title thereof. This action is entitled "The State of Oklahoma ex rel. Bunner Sims v. John Caruthers, Judge of the Ninth Judicial District of the State of Oklahoma." Section 4224, Wilson's Rev. & Ann. St. Okla. 1903, provides that all actions must be prosecuted in the name of the real party in interest, unless otherwise provided, but this case does not come within the exceptions named in the statutes. Therefore, in a mandamus proceeding to enforce a private right, the real party in interest should be named as plaintiff, and such proceedings should not be entitled in the name of the state on the relation of such party.

Stanford & Cochran, for relator.—Mandamus as the proper remedy: *Ex parte Cole*, 28 Ala. 50; *Palmer v. Jackson, Judge*, (Mich.) 50 N. W. 1086; *State v. Johnson, Judge*, (Wis.) 80 N. W. 1184; *Schwartz v. Berry, Judge*, (Mich.) 51 N. W. 279; *Ex parte Scott*, 19 Ohio St. 581; *State v. Burgoyne*, 7 Ohio St. 153; *Gordon v. Longest*, 16 Peters (U. S.) 97; *Watson v. Judge*, 40 Mich. 729.

On the question of what constitutes a "speedy trial": Mansfield's Digest of the Statutes of Arkansas, c. 46, §§ 2191, 2192, 2193; *People v. Marino* (Cal.) 24 Pac. 892; *State v. Kuhn*, 154 Ind. 450; *Newland v. People,* 221 Ill. 166;*Van Buren v. People,* 7, Colo. App. 136; *State v. Sims,* 1 Overt. (Tenn.) 253; *United States v. Fox,* 3 Mont. 512.

Charles West, Atty Gen. and *W. C. Reeves,* Asst. Atty. Gen. for respondent.—

Mandamus not the proper remedy: Wilson Rev. and Ann. St. Okla. 1903, § 4885.

On what constitutes a "speedy trial": *Stewart v. State,* 13 Ark. 720; *Nixon v. State,* 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601; *State v. Huting,* 21 Mo. 469; *Ex parte Stanley,* 4 Nev. 113; *State v. Endsley,* 19 Utah, 478; *Commonwealth v. Adcock,* 8 Grat. 661; *In re Edwards,* 35 Kan. 99, 10 Pac. 539; *People v. Ruloff,* 5 Parker C. R. 47; 12 Cyc. 500; *Clark v. Commonwealth,* 29 Pa. St. 129; *Beavers v. Haubert,* 198 U. S. 86, 49 L. Ed. 950; *Com. v. Jailer,* 7 Watts (Pa.) 366; *People v. Vosale,* 120 Cal. 168, 52 Pac. 305; *State v. Euke,* 85 Iowa, 35; *Patterson v. State,* 49 N. J. Law, 326; *Ex parte Turman,* 26 Tex. 708, 84 Am. Dec. 598.

BAKER, JUDGE. (after stating the facts as above). After carefully considering the proof in this case, and reading and analyzing all the authorities cited on both sides, and such additional authorities as we were able to find after an exhaustive and painstaking search, we find at least four questions are presented herein: First. Is relator entitled to a writ of mandamus when he has a plain and adequate remedy in the ordinary course of law? Second. What law of procedure shall apply in the disposition of the cases against him? Shall the law of Arkansas, as adopted by Congress, and put in force in the Indian Territory at the time of the finding of the indictments against relator, or shall the laws of the Territory of Oklahoma, as extended over the Indian Territory by an act of Congress known as the "Enabling Act," apply? Third. What, under the law applicable in this case, is meant by a speedy public trial? Fourth. Has the relator been denied the benefit of a speedy public trial by an impartial jury, as guaranteed to him by the provisions of the Constitution, and the statutes in force in the jurisdiction where his cases are pending?

Considering said propositions in the above order, we have first: "Is the relator entitled to a writ of mandamus when he has a plain and adequate remedy in the ordinary course of the law?" Section 4885, Wilson's Rev. & Ann. St. Okla. 1903, referring to the writ of mandamus, provides: "Sec. 4885. This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." This court thinks that under the facts and circumstances of this case, the relator has a plain and adequate remedy in the ordinary course of the law: First. By a decision upon his motion pending in the Ninth judicial district of this state, for the county of Okmulgee, wherein he asks to be discharged by reason of not having received a speedy trial, as provided by law. It is true that the relator's petition alleges, and one of the learned counsel, in his affidavit in support of the petition, swears, that the respondent, as the judge of said district court for said county, failed and refused to decide said motion. This the respondent says, under his oath, is not true; on the contrary, that the motion of relator, filed May 5, 1908, demanding a trial was never argued in said court; that said court never refused to enter an order of record, either discharging the relator and dismissing the said cases against him, or overruling said motion and setting said cases for trial, and that said motion is wholly undetermined. The burden of proof being on the relator, weighing the evidence in the usual way, and giving the respondent the benefit of the legal presumption that every public officer and every court is presumed to do its duty under the law, we find that said motion is therefore still pending in said court. In *Patterson v. State*, 49 N. J. Law, 326, 8 Atl. 305, the court holds:

"A defendant should not be discharged on *habeas corpus* because he has not been tried the second term after issue joined, under the provisions of section 65 of the act concerning criminal proceedings, unless it appears, first, that he has applied to the trial court and has been refused his discharge;

and, secondly, that such refusal was so arbitary and groundless as to amount to a clear abuse of discretion."

Secondly. The relator has another plain and adequate remedy at law, in this: that in the event said motion demanding his discharge in said court is overruled, and he is convicted in said court, and he desires to do so, he has a right to appeal from said court to this court. See *Territory of Oklahoma, on the relation of H. L. Miller v. Hewitt et al.*, 5 Okla. 167; and *Wood, Respondent, v. Strother, Auditor, et al.*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Ex parte Campbell et al.*, 130 Ala. 171, 30 South. 385; *Stewart v. Territory of Oklahoma ex rel.*, 4 Okla. 707, 46 Pac. 487; *Nettie Collet v. Wm. M. Allison*, 1 Okla. 42, 25 Pac. 516.

Finding, therefore, that said relator has a plain and adequate remedy at law, he is not entitled to a writ of mandamus at this time; but cases might arise where, through an abuse of the discretion of the trial judge, it would be otherwise. This court might well have rested from its labors in connection with this case by denying the writ, for the reasons already stated; but, inasmuch as this court has, as heretofore announced, determined to decide every material proposition fairly made in the record presented to it, and realizing the great importance of the questions involved, and feeling the interests of justice and the necessity of settling all questions of procedure in the state as speedily as possible, we will, therefore, decide all the other essential propositions made by the record and proof herein.

Coming now to the second proposition: "What law of procedure shall be applied in the determination of the rights of the relator?" We think the law in force in the Indian Territory from the time chapter 46 of Mansfield's Digest of the Laws of the State of Arkansas was adopted by Act Cong. May 2, 1890, c. 182, 26 Stat. 81, and put in force in the Indian Territory, and continuing until Oklahoma was admitted into the Union, shall control. Within the meaning of the Constitution of the United States, any law is *ex post facto* which is enacted after the commission of the offense, and which, in relation to it or its consequences, in any way affects the material situation of the accused to his prejudice or disadvantage. This doctrine is most ably sustained in a very learned and exhaustive opinion written by one of the world's ablest jurists, Mr. Justice Miller, of the Supreme Court of the United States, and decided by that court in the case of *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506, a capital case; Kring, having been indicted and convicted of murder in the first degree. The judgment was affirmed by the Supreme Court of Missouri, a previous sentence, however, having been pronounced against him on his plea of guilty of murder in the second degree, and subjecting him to imprisonment for 25 years, which sentence on his plea had been appealed, reversed, and set aside by said court. By the law of Missouri, in force when the homicide was committed, this sentence was, in effect, an acquittal of the crime of murder in a higher degree. Before his plea of guilty was entered, the law was changed so that by force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. Held that, as to this case, the new law was *ex post facto,* within the meaning of section 10, art. 1, of the Constitution of the United States, and that he could not be again tried for murder in the first degree This decision is entirely in accordance with our conception of justice and fairness. The accused should be tried and dealt with under the law as it existed at the time of the commission of the crime of which he stands charged. Any other doctrine would be fraught with many hardships and uncertainties, and would be repugnant to the well-established policy of the law.

It was, by counsel in the Kring Case, urged that as to the rights of persons charged with crime under subsequent legislation affecting those rights, even though the changes in the law were radically to the disadvantage of the accused, it is not *ex post facto,* because it was a change, not in crimes, but in criminal procedure. This view the Supreme Court of the United States refused to accept, but proceeded to define the much vexed question as to what is meant by "procedure" as a law term; and said court wisely adopted the definition laid down by the distinguished writer on criminal law, Joel Prentiss Bishop, in his valuable work on Criminal Procedure. Bishop, in the first chapter of his work, undertakes to define what is meant by "procedure." He says:

> "Sec. 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice."

And in defining practice in this sense, he says:

> "The word means those legal rules which direct the course of proceeding to bring parties into the court, and the course of court after they are brought in."

Evidence:

> "Signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

We think the court in the *Kring v. Missouri* Case lays down a correct and clear idea of what is intended by the word "procedure" as applied to a criminal case. It is, therefore, obvious that a law which is one of procedure may be decidedly obnoxious as an *ex post facto;* for any law which would alter the legal rules of evidence, or receive less, or different, testimony than the law rquires at the time of the commission of the offense, or would apply different rules for the conduct of the trial of the case, is an *ex post facto* law. Many instances might be cited where a change of the law would not, in fact, change the crime or its punishment, but would still, in the application of the changed condition of the procedure, materially and prejudicially affect the rights of the accused. No *ex post facto* law will be enforced against the accused which would in any way be prejudicial to his rights.

We think that Congress, in passing the enabling act, intended to settle the question as to the lay applicable in cases then pending in the Indian Territory. Section 20 of the enabling act provides: (Act March 4, 1907, c. 2911, 34 Stat. 1287)

"All criminal cases pending in the United States courts in the Indian Territory not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be prosecuted to final determination in the state courts of Oklahoma under the laws now in force in that territory."

This court, therefore, holds that the law in force in the Indian Territory at the time the indictments were returned in the cases against the relator shall govern the disposition of his cases.

This brings us to the third proposition: "What, under the law applicable in this case, is meant by 'speedy trial'?" The provisions of the sixth amendment to the Constitution of the United States, guaranteeing the accused a speedy trial, are applicable to the territories, including the Indian Territory. This is well settled in the cases of *In re Dykes et al.*, 13 Okla. 339, 74 Pac. 506; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244; *Callan v. ilson,* 127 U. S. 550, 8 Sup. Ct. 1301, 32 L. Ed. 223; *Rasmussen v. United States,* v97 U. S. 522, 25 Sup. Ct. 514, 49 L. Ed. 862; and *Stewart v. State,* 13 Ark. 720. Neither the Constitution of the United States, nor any act of Congress, fixes the time within which a person accused of crime and imprisoned shall be tried; but the act of Congress of May 2, 1890, c. 182, 26 Stat. p. 87, § 11, adopting and putting in force in the Indian Territory, chapter 46 of the General Laws of the State of Arkansas, entitled "Criminal Procedure," offers a definition of "speedy trial," or rather fixes the limitations within which a trial might be had without violating the Constitutional provisions. The part of said chapter 46 applicable to the case at bar is the provisions of sections 2192 and 2193 of Mansfield's Digest of the General Laws of the State of Arkansas:

"Sec. 2192. If any person indicted for any offense and held to bail shall not be brought to trial before the end of the third term of the court in which such indictment is pending, it shall be held after a finding of such indictment and holding to bail thereon, he shall be discharged so far as relates to such offense, unless the delay happens on his application.

"Sec. 2193. Nothing in the two preceding sections shall be so construed as to discharge any person who shall have been indicted for any criminal offense on account of the failure of the judge to hold any term of court, or for the want of time to try such person at any term of the court."

Whenever Congress in legislating for the territories (including Indian Territory) borrowed, from the statutes of a state, provisions which had received in such state a known, defined, and settled construction before they were enacted by Congress, that construction must be deemed to have been adopted by the courts over which such legislation extended; and the provisions of such laws should be construed as they were understood at the time in the state from which the same were borrowed. American & English Enc. of Law (2d Ed.) vol. 26, p. 702, and cases cited. We find that sections 2192 and 2193, of Mansfield's Digest, just quoted, had received in the state of Arkansas a definite and settled construction long before said statutes were adopted by the act of Congress putting them in force in the Indian Territory. In the case of *Stewart v. State*, 13 Ark. 720, the court, after very carefully considering the case, held that, notwithstanding there had been held three regular terms of court after the finding of the indictment against Stewart, at which there had been ample time in which to try the case, the accused, in order to avail himself of the rights conferred by that statute, was required to place himself upon record in the court in which the indictment was pending in the attitude of demanding a trial, or, at least, to have opposed postponement. *Thos. A. Watts, Plaintiff in Error v. State of Georgia*, 26 Ga. 231; *Dillard v. State*, 65 Ark. 404, 46 S. W. 533; *State of Iowa v. Louis Enke*, 85 Iowa, 35, 51 N. W. 1146; *Patterson v. State*, 49 N. J. Law, 327, 8 Atl. 305. The record in this case does not show that the relator opposed the continuance of his cases during the two terms of the federal court, of which he complains, and apparently made no effort whatever to have his cases brought to trial in said court, nor does the record disclose that he objected to a continuance of his cases at the first two terms of the state court in which the indictments against him were then pending. If, in fact, the first two terms of the state court were, in law, such terms as the relator could have insisted upon being tried at on said indictments, it is well settled that the accused will not be heard to complain that he was not tried at a term of court when, for good reasons, no jury was summoned to try cases during said term; or where a jury had been summoned, and for good cause, such as a pestilence, or the existence of an epidemic of contagious disease, the jury summoned for that term was discharged. *People v. Benc*, 130 Cal. 159, 62 Pac. 404; *People v. John Vesalo,* 120 Cal. 168, 52 Pac. 305; *State v. Huting*, 21 Mo. 464. The proof in this case shows that the first, or December, 1907, term of the district court of the Ninth judicial district of Oklahoma, for Okmulgee, in which the indictments against relator are pending, was called for the purpose only of organizing said court and putting the "machinery in running order," and, therefore, no jury was summoned; that at the January, 1908, term, a jury was called for said court, and relator's cases set down for trial on the 10th day of February, 1908; that neither the relator nor his attorneys were present at said term, and had made no preparation whatever for the trial of his cases, or either of them, at said term; and that neither relator nor his attorneys made any objection to the court discharging the jury on account of the smallpox epidemic, or for any other reason. Relator, therefore, waived his right to be tried at said term. (See section 995 and succeeding sections, Bishop's New Criminal Law, and cases there cited.) The record shows that on the 5th day of May, 1908, during the April term of said court, relator, by his attorneys, filed in said court the following motion:

> "Now comes defendant by his attorneys, Stanford & Cochran, and formally demands that he be put upon his trial in the above-entitled cause, or that he be discharged from the indictment herein, by reason of his being denied his right of a speedy trial."

The same motion was filed in each of the cases pending in said court against relator. As we said before, the proof herein adduced does not show, nor does the record of said court show, that said motions, or either of them, have ever been passed upon by said court. But, for the purpose of settling these questions, so far as this court is concerned, we will treat the record as if said motions had, in fact, been overruled.

This brings us to the fourth and last proposition: "Has the relator had the benefit of a speedy public trial, as guaranteed to him by the provisions of the Constitution and statutes in force in the jurisdiction where his cases are pending?" The relator bases his claim for a peremptory writ of mandamus from this court compelling respondent, as district judge of the Ninth judicial district of this state, to make an order discharging him, upon the ground that he has been deprived, through the fault of the state, of his constitutional right to a speedy trial. We have carefully read all the cases cited by the relator in support of his contentions herein, and we find from such examination that the cases first hereinafter cited fully authorize, in a proper case, the writ of mandamus to enforce the dismissal of a criminal action where the right to a speedy trial has been denied, *Ex parte Cole,* 28Ala. 50; *Palmer v. Jackson County,* 90 Mich. 1, 50 N. W. 1086; *State v. Johnson, Judge,* 105 Wis. 90, 80 N. W. 1104; *Schwartz v. Barry, Judge,* 90 Mich. 207, 51 N. W. 279; *Ex parte Scott,* 19 Ohio St. 581; *State v. Burgoyne,* 7 Ohio St. 153; *Gordon v. Longest,* 16 Pet. 97, 10 L. Ed. 900; *Watson v. Judge,* 40 Mich. 729.

The relator, in support of his contention that he should be discharged from said indictments, cites *State v. Sims,* 1 Overt. (Tenn.) 253. The defendant in this case was committed for stealing goods out of Potter's store. There was no Attorney General, nor any person to prosecute for the state. Campbell, J., requested the prosecutor to be called. He was, and asked if he had anything to say as to why the court should not discharge the defendant, as his counsel insisted that he had a right to claim his discharge.

"Overton, J. The ninth section of the Bill of Rights secures to the citizen the right to a speedy public trial, and to demand the cause of the accusation against him. The state has omitted to provide an Attorney General since the resignation of the former one. Upon this man's demanding the cause of accusation against him, and that he shall have a trial, and there being no reason shown why he should not, he ought to be discharged. The omission of the state to provide a public prosecutor cannot render the provision of the Constitution inefficient. This circumstance of itself furnishes no ground to keep the pirsoner six months longer in confinement."

"Campbell, J. and Powel, J., gave no decisive opinion on this ground, but the prisoner was discharged."

This case was tried over a hundred years ago, and is the first case we have found where the right of a speedy trial in a criminal case found judicial determination in this country. The above case in no wise supports the contention of relator in this case. In the case at bar the state provided a prosecutor, who, according to his affidavit filed in this case, was always ready, and is now ready to try the cases of the relator, but was unable to do so for the want of time.

Relator cites the case of *Newlin v. People,* 221 Ill. 166, 77 N. E. 529, an Illinois case. The state of Illinois has a statute requiring that all criminal cases shall be tried within four months of the date of the commitment; failing to do so, confers an absolute right on the person charged with the crime and imprisoned to be set at liberty unless tried within the time limited. It will be observed that under the Illinois statute the person charged with the crime must be imprisoned before he has a right to a discharge after the four months' period has expired. The court in said case holds that where a person charged with crime and imprisoned applies for his discharge, it is not sufficient to say that it was inconvenient or impossible for the judges of the court to hold the term of court at the time fixed by statute, within the four months. It will be observed, also, that under chapter 37, § 57, of the Statutes of Illinois (Hurd's Rev. St. 1908), different judges may hold court for each other, and perform each other's duties where they find it necessary or convenient; and that the right secured to the accused by said statute cannot be defeated arbitrarily by an order made without his consent, dispensing with the services of a jury at a term commencing within four months of the date of the commitment. Thus we find from an examination of the facts in this case that relator's contention is not sustained.

The relator cites the case of *People v. Morino,* 85 Cal. 515, 24 Pac. 892. This case construes section 13 of article 1 of the Constitution of California, which guarantees a speedy trial to every person charged with crime. The California Revised Code (section 1382) also provides that unless good cause is shown the court must order the prosecution to be dismissed. If the defendant, whose trial has not been postponed upon his own application, is not brought to trial within 60 days after the filing of the indictment or information, this case holds, "that a person against whom information was filed on August 7th, and who was arraigned and pleaded not guilty five days later, was entitled to a dismissal in the case for want of prosecution on motion made the following March, when it appeared he had made no application for a continuance, and no cause for the delay was shown by the prosecution." In this case there was no cause whatever for the delay shown.

People v. Buckley, 116 Cal. 146, 47 Pac. 1009, is also cited and relied upon. In this case information was filed December 27th; defendant arraigned January 4th; demurred on the 11th; demurrer argued 18th, and overruled the 25th. Defendant then pleaded not guilty. Case was called for trial February 12th; defendant obtained a continuance of one day, but the trial did not occur until March 18th. Held, that defendant was entitled to dismissal under section 1382, providing that the prosecution shall be dismissed unless good cause to the contrary be shown. This court also held that the mere statement of the judge, on denying the motion to dismiss, that during the time of delay the court had been wholly occupied with other cases, does not show good cause for the delay. Nor was it good cause that a material witness for the state was absent, unless diligence was shown to procure his attendance.

State v. Kuhn, 154 Ind. 450, 57 N. E. 106, is also relied on by relator. This was a construction of section 1852, Burns' Ann.

St. Ind. 1894, and section 1783, Horner's Ann. St. Ind. 1897. These statutes provide that, unless the accused be brought to trial within three terms after admission to bail, he shall be discharged, unless the delay be caused by his own act. Held, that the prisoner, not having been brought to trial within the time prescribed by said statute, was entitled to be discharged.

These cases, with the case of *Van Buren v. People,* 7 Colo. App. 136, 42 Pac. 599, are all the cases cited and relied on by the relator. This last-named case holds:

> "The elapse of three full terms of court after the issuance of a capias and arrest of the defendant without application to postpone or delay the trial, entitled him to a discharge, notwithstanding he was out on bail."

All the cases (with few exceptions) cited by relator upon the subject of the right of his discharge for want of speedy trial are either error or appeal cases, and not mandamus.

Many courts of last resort have defined the legal meaning of a speedy public trial, but we submit that in none of the states in which this question has found judicial investigation and decision have the facts regarding the condition of the courts been such as existed in the Indian Territory prior to statehood. It is well known to the bar, and public generally, in this state, that a condition existed in the federal courts of the Indian Territory before statehood unprecedented in the history of jurisprudence of the nation. Until about two years prior to statehood only four judges were provided to hold court in the entire territory, comprising the Five Civilized Tribes, and a population of, approximately, 800,000. It will be remembered that said judges had jurisdiction of all classes of criminal cases, from the smallest misdemeanor to capital offenses; and, also had jurisdiction of all civil cases, including chancery and probate matters. It was, therefore, a common occurrence to find upon the dockets of said courts thousands of undecided cases, both criminal and civil. It was, under such conditions, a physical impossibility for said courts to give all the accused speedy trials. It will be conceded that said courts did all in their power to dispatch business; so much so, that the haste in which cases were sometimes disposed of often brought a blush of shame upon the cheek of the members of the bar, the jurors, and spectators This condition of affairs, combined with the ambition of at least one of the judges of said federal court to dispose of more cases than any of the other judges, caused him to attempt the horrible feat of sentencing 100 prisoners in 100 minutes, and similar travesties upon justice and the forms of law. The government sought to aid the congested condition of the dockets in said courts by appointing, about two years before statehood, four additional judges; but the number of accumulated cases and new cases had so grown upon the dockets of said courts that it was impossible for the additional judges to much relieve the situation. Therefore, in deciding the question of a speedy trial in this case, due regard should be had to all the facts and circumstances. It must also be remembered that respondent in this case fell heir, so to speak, to the congested condition of the docket in his district, and in which the relator's cases are pending; also that, necessarily, delays were caused by the change of the form of government, and the inauguration of the state courts.

Many courts of last resort in states where conditions have been much more favorable to the enforcement of the right of a speedy trial than those existing in this state at this time have defined the legal meaning of a speedy public trial. One of the early cases on this subject is found in the case of *Nixon v. State*, 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601. The first syllabus of this case reads:

> "By a speedy trial is intended a trial conducted according to the fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and offensive delays manufactured by the ministers of justice."

In *State, Respondent, v. Huting*, 21 Mo. 464, referring to a statute in that state conferring the right of speedy trial, bottom of second syllabus says: "The statute was intended to operate only when there is some laches on the part of the state." In this case the court further holds:

"It is very clear that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for trial. Nor does a speedy trial mean a trial immediately upon presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment has been found, without depriving the prosecution of a reasonable time for preparation. The law is the embodiment of reason and good sense; hence, while it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary efforts, diligence, or exertion from the courts or representatives of the state, nor does it contemplate that the right of a speedy trial which it guarantees to the prisoner shall operate to deprive the state of a reasonable opportunity of fairly prosecuting the prisoner."

The right of a speedy trial is necessarily relative; it is consistent with delays, and depends upon circumstances. It secures rights for the defendant, but it does not preclude the rights of public justice. *Beavers v. Haubert,* 198 U. S. 86, 25 Sup. Ct. 573, 49 L. Ed. 950.

"There is no doubt that necessity, either moral or physical, may raise an available exception to the letter of the *habeas corpus* act. A court is not bound to peril life in an attempt to perform what was intended to be required of it. The Legislature intended to prevent willful and oppressive delay; and it is sufficient that there is no color of imputation of it." (*Commonwealth v. Jailer,* 7 Watts [Pa.] 366).

From the proof it clearly appears that there was pending in the district court of Okmulgee county, at the beginning of the September, 1908, term, 419 criminal cases and 409 civil cases; and that since the admission of Oklahoma as a state more cases have been filed that it has been possible to try; and that it was a physical impossibility, and beyond the power of physical and mental achievement, to have disposed of all the criminal cases on the docket within the time of the terms of court as fixed by order of the Supreme Court. Ordinarily, a court should require a showing to be made by affidavit, in order to continue cases for the term, when such continuances are objected to by either party; but when a condition of affairs exists that is notorious, and about which, from its very nature, there could be no conflict, the court is authorized, by its own motion, to continue the causes for the term. The regulation of the business of the term is a matter exclusively within the control of the judge, and cannot be interfered with. *Ex parte Larkin,* 11 Nev. 90; *Ex parte Stanley,* 4 Nev. 116.

In *State v. Enke,* 85 Iowa, 35, 51 N. W. 1146, held: Where the trial has not been postponed upon defendant's application, if he be not brought to trial at the next regular term of the court in which the indictment is triable, after the same is found, the court must order the defendant to be dismissed, unless for good cause to the contrary. In this case the record did not show that the accused made objection to the continuance of the case. The court held: "We do not think that it was necessary that the record should show the reason why the case was continued."

In New Jersey the statutes provide that every indictment shall be tried at the term or session in which issue is joined, or the term after, unless the court, for just cause, shall allow further time for the trial thereof, and, if such indictment be not so tried, the defendant shall be discharged. The Supreme Court, in the case of *Patterson v. State,* 49 N. J. Law, 326, 8 Atl. 305, where the accused relied upon this statutory provision in support of his motion to be discharged held that the statute was drafted to effectuate the purpose which the constitutional guaranty of a speedy trial was designed to secure, that the remedy of accused lies in the first instance in the trial court, for the reason that the existence of facts which will afford a just cause for allowance of further time is peculiarly within the knowledge of the trial court, and that nowhere else can the exercise of the discretion be so intelligently discharged.

Judge Cooley, in his excellent work on Constitutional Limitations, says: "It is required that the trial shall be speedy; and here also the injunction is addressed to the sense of justice and sound judgment of the court." Cooley on Const. Lim. p. 311.

It must appear that the application was made to the trial court for discharge, and that there was an arbitrary and causeless refusal to do so, before a discharge would be ordered by appellate court. It would be presumed that the court exercised discretion in a proper, honest, and judicial spirit; and that sufficient reasons were before the court to justify the delay. An appellate court will not review the exercise of discretion by a lower court, unless it appears from the record or proof that the trial court had abused such discretion.

Section 2192, Mansfield's Digest of the Laws of the State of Arkansas, was passed to protect prisoners, and afford them a speedy trial. If, therefore, the state should indict a person and confine him in the prison of the county, or cause him to give bail, as the case may require, and afterwards took no steps to bring accused to trial, and thus lie by and do nothing until the third term after that at which the indictment was found, such delay and neglect on the part the state will authorize and justify the discharge of accused from such offense. On the other hand, if the state makes every proper and reasonable exertion to bring the accused to trial, yet fails, from causes beyond the control of the state, the trial may be properly delayed.

A fair and reasonable construction of sections 2192 and 2193 evidently contemplated that the accused is not to be discharged, as a matter of course, after the expiration of three terms, or at any other term, except on application to the court. Upon such application being made, it becomes a question whether the delay resulted from any of the causes which were contained in said section 2193. If the delay was not occasioned by any of the causes within the exception, the court, if so satisfied, should order the relator discharged. But, if, however, the court, upon such application being made, should be honestly satisfied that the delay was the result of one of the causes within the execption, it would be the duty of the court to continue the cause until the next term, and hold the accused, unconditionally, to await his trial as long and as often as the state is able to make it truthfully appear that the occasion of the delay is one of the excepted causes enumerated in said section.

The court below is authorized to use its discretion in the disposition of such motion to discharge, unless the accused has made out a case in all respects free from any of the statutory exceptions. Then such court has no further discretionary power to continue— the application and motion to discharge should be allowed.

In support of the findings of the court in this case see copious notes to *Nixon v. State,* 2 Smedes & M. (Miss.) 497, 41 Am. Dec. 601, and *Dillard v. State,* 65 Ark. 404, 46 S. W. 533; *In re James Dykes et al.,* 13 Okla. 339, 74 Pac. 506; *Ex parte McGehan,* 22 Ohio St. 442; *United States v. Fox,* 3 Mont. 512; *State of Iowa v. Enke,* 85 Iowa, 35, 51 N. W. 1146; *Wood v. Strother, Auditor,* 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Ex parte Turman,* 26 Tex. 708, 84 Am. Dec. 598; *People v. Benc,* 130 Cal. 159, 62 Pac. 404; *Ex parte Larkin,* 11 Nev. 90; *People v. Henry* 77 Cal. 445, 19 Pac. 830; *Commonwealth v. Adcock,* 8 Grat. (Va.) 661; *Roebuck, Plaintiff in Error, v. State,* 57 Ga. 154; *State of Utah v. Endsley,* 19 Utah, 478, 57 Pac. 430; *In re Murphy,* (C. C.) 87 Fed. 549.

The proof fails to show laches on the part of the court below in bringing relator to trial—the contrary is shown to be true. At the first term no jury was summoned, and the term so-called (as we above stated) was for the purpose of organizing the state courts, it being the first term under statehood.. The second term complained of, the jury was discharged on account of smallpox epidemic, but not until after the witnesses for the state had been subpoenaed in relator's cases for February 10th, of said term, which shows diligence on the part of the officers of the court and respondent to bring relator's cases to trial.

For the reasons herein stated, the peremptory writ of mandamus is denied.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

JOE VICKERS v. UNITED STATES.

No. 750, Ind. T. Opinion Filed November 19, 1908.

(98 Pac. 467.)

1. **RAPE—Indictment—Sufficiency.** An indictment for rape under section 911, Ind. T. Ann. St. 1899 (Mansf. Dig. sec. 1568), that omits to allege that the accused "did carnally know, forcibly and against her will," or at least allege "sexual intercourse against the will and without the consent" of the female, is fatally defective.

2. **INDICTMENT AND INFORMATION—Certainty and Particularity.** In framing an indictment the general rule is "that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar of another indictment for the same offense."

3. **RAPE—Punishment—Capital Punishment.** A verdict of guilty "without capital punishment" may be rendered in a rape case under Act Cong. Jan. 15, 1897, c. 29, 29 Stat. 487 (U. S. Comp. St. 1901, p. 3620), even if there are no mitigating or palliating circumstances.

4. **CRIMINAL LAW—Instructions—Punishment.** It is the duty of the trial court to instruct the jury that if they shall find a verdict of guilty of rape they may qualify their verdict by the words, "without capital punishment," no matter what the evidence may be.

5. **INDIANS—Proof of Race—Punishment.** In this case the evidence should affirmatively show that the defendant is not an Indian before the question of the death penalty could be submitted to the jury.

6. **RAPE—Instructions—Grade of Offense.** Where the proof is inconclusive as to the consummation by penetration, and the proof is evident as to assault with intent to commit rape, it is the duty of the trial court to instruct the jury of their right to convict of the lower offense.

7. **SAME—Evidence—Sufficiency.** A conviction of rape with sentence of death cannot be based on contradictory testimony of the prosecutrix as to whether or not there was penetration.

8. **CRIMINAL LAW—Evidence—Other Offenses.** Evidence is admissible that tends directly to prove the defendant guilty, although it may also tend to prove a distinct felony and thus prejudice the accused.

9. **SAME.** On a trial for rape, evidence of other independent crimes, such as burglary and larceny, committed by defendant in another state, is inadmissible.

10. **SAME—Misconduct of Counsel.** Where the language used by the Assistant United States Attorney in his opening statement is calculated to prejudice the accused, and proper objection is made and

overruled by the court, and exception taken, the question will be reviewed by this court, but not otherwise.

11. **NEW TRIAL—Argument of Prosecuting Attorney.** When the remarks of the Assistant United States Attorney to the jury in a rape case appeal to their fears or vanity and tend to coerce and cajole them, it is good grounds for a new trial, and the motion for new trial should have been granted.

12. **SAME.** Where the Assistant United States Attorney in his argument to the jury went outside of the record and appealed to the passions and prejudices of the jury, and objection was made and overruled, the strength of the testimony against the defendant will be considered, and, if the improper statements may have determined the verdict, a new trial will be granted.
(Syllabus by the Court.)

Error to the United States Court for the Western District of the Indian Territory, at Muskogee; William R. Lawrence, Judge.

Joe Vickers was convicted of rape, and brought error to the United States Court of Appeals for the Indian Territory, whence the case was transferred under the enabling act to the Supreme Court of Oklahoma, and from that court to the Criminal Court of Appeals. Reversed and remanded.

Lynn W. Culp, John Watkins, J. E. Wyand, and *George K. Powell,* for plaintiff in error.

William M. Mellette, U. S. Atty. *Chas West,* Atty. Gen. and *W. C. Reeves,* Asst. Atty. Gen., for the United States.

DOYLE, JUDGE. The plaintiff in error was indicted in the United States Court in the Indian Territory for the Western District of said territory, sitting at Muskogee, at the October term, 1904, for the crime of rape, alleged to have been committed within said jurisdiction on the 16th day of May, 1904, upon one Bessie Dunbar. Said indictment was returned in open court on the 4th day of October, 1904. Defendant was duly arraigned, and pleaded not guilty, and was tried upon said indictment at the January, 1905, term of said court. The jury returned a verdict finding the defendant guilty of rape, as charged in said indictment. Whereupon the defendant filed his motion for a new trial, which motion was, on the 7th day of April, 1905, sustained by the court, and a new trial ordered. Thereafter, at the January, 1906, term of said court, a second trial was had, and on the 11th day of January, 1906, the jury in said case returned the following verdict: "We, the jury, find the defendant guilty of rape in the manner and form as charged in the indictment." On the 10th day of February, 1906, the court overruled defendant's motion for a new trial. Whereupon the defendant moved the court in arrest of judgment upon said verdict for the reason that the venue had not been proven, which motion was denied, and the court then and there sentenced defendant to be hanged on the 20th day of April, 1906, at the city of Muskogee. And thereafter, on the same day, to wit, the 10th day of February, being a day of the regular January, 1906, term of said court, in the afternoon of said day, the defendant was again brought before the court, and was asked by the court if he had anything to say why the judgment of the court should not be pronounced upon him, the court explaining to the defendant the nature of the charge, the result of the trial, and the meaning of the verdict; and then and there, over defendant's objection, again sentenced defendant to be hanged on the 20th day of April, 1906.

On the 12th day of April, 1906, a writ of error was allowed to the United States Court of Appeals for the Indian Territory, and this case was pending in said court when Oklahoma was admitted into the Union as a state. It was then removed to the Supreme Court of Oklahoma, by virtue of the provisions of the enabling act and the Constitution and laws of Oklahoma, and was duly transferred to this court by virtue of section 170, art. 7, of the Constitution of Oklahoma, and chapter 28, Sess. Laws, 1st Sess. State Legislature of Okla., the same being entitled "An act creating a criminal court of appeals, and defining the jurisdiction of said court,," approved May 18, 1908 (Laws 1907-08, p. 291).

Numerous assignments of error are presented by the petition, and are argued in the briefs; such as the verdict is not supported by sufficent evidence, error of the court in admitting evidence of offenses other than the one charged, improper conduct of the United States attorney in arguing the case, errors in admitting incompetent testimony; in excluding competent testimony, in failing to furnish the list of jurors who were to hear the case, in overruling motion for a new trial, and in not sustaining motion in arrest of judgment, and also in resentencing defendant. The main contention of the defendant in the oral argument of the case before this court, by Mr. Powell, his counsel, was: First, that there was not sufficient evidence to warrant the conviction; second, that it was reversible error to admit evidence of other offenses; third, that the misconduct of the United States attorney was such that the defendant was denied a fair and impartial trial.

We have carefully examined the record, and, in the consideration of this case, we have tried to exercise that degree of caution and care that a proper administration of the criminal laws demand of all courts in all cases of life and death. The record showing the indictment on which he was tried (omitting the formal parts) reads as follows:

"In the United States Court, in the Indian Territory, for the Western District of said Territory, at the October Term, A. D. 1904. United States, Plaintiff. vs. Joe Vickers, Defendant. Indictment for rape. The grand jurors of the United States of America, duly selected, impaneled, sworn, and charged to inquire within and for the body of the Western District of the Indian Territory in the name and by the authority of the United States of America, upon their oaths, do find, present and charge that one Joe Vickers on the 16th day of May, A. D. 1904, within the Western District of the Indian Territory, in and upon one Bessie Dunbar, a female, forcibly and feloniously did make an assault and her, the said Bessie Dunbar not being then and there the wife of him, the said Joe Vickers, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. E. L. Kistler, Assistant United States Attorney, Western District of Indian Territory."

It is beyond the comprehension of this court to understand how the indictment in this case could be considered sufficient by the trial court to sustain the judgment and sentence imposed. If we except the allegation of felonious assault, this indictment does not allege a single act which enters into and constitutes any one of the essential elements of the crime of rape. Section 911, Ind. T. Ann. St. 1899 (Mansf. Dig. § 1568), defines the offense of rape as follows: "Rape is the carnal knowledge of a female forcibly and against her will." This indictment omits to allege the following elements of the offense as above defined: That he feloniously did ravish, and carnally know forcibly, and against the will of said female; or at least set forth sexual intercourse committed against the will, and without the consent of the female. This omission renders the indictment fatally defective. Under any rule of construction it is not sufficient. It does not follow the language of the statute. The fact charged as the offense is not stated with a sufficient degree of certainty to enable the court to pronounce judgment upon a conviction, according to the right of the case; and it is not sufficiently certain to enable the accused to plead the judgment that may be given upon it, in bar of another prosecution for the same offense. It denies to defendant his constitutional right to be informed of the nature and cause of the accusation. A defendant should be clearly informed in the indictment of the exact and full charge made against him. The general rule, to which there are but few exceptions, is that all the material facts and circumstances comprised in the definition of the offense must be alleged. This indictment does not, in any way, charge a felonious ravishment. It is our opinion that the charging part of this indictment is not in substance sufficiently specific to put the defendant fairly on trial for the offense sought to be charged.

Error in the record is not presumed; there should be at least some evidence to show it. However, before a court of last resort affirms a judgment of conviction in a capital case, it should appear affirmatively, from the record, that every step necessary to the validity of the sentence has been taken. We believe, from our examination of the record, that this case has been tried and submitted to the jury upon an erroneous theory, prejudicial to the rights of the defendant, and which had a controlling influence upon the trial and the result. Although not urged upon the trial, nor here, we deem it our duty to pass upon and decide this question, as that which the law makes essential in proceedings involving the deprivation of life cannot be dispensed with or affected by consent of the accused, much less by his mere failure, when on trial, to object to unauthorized methods. It seems that the court did not instruct the jury as to their right to return a qualified verdict. While the Arkansas procedure was in force in that jurisdiction, the federal laws controlled in fixing the penalty in a case of this kind, and provided:

> "That in all cases where the accused is found guilty of the crime of murder or of rape, under section five thousand three hundred, thirty-nine, and five thousand three hundred, forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto, 'without capital punishment,' and whenever the jury shall return a verdict, qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." (Act. Jan. 15, 1897, c. 29, 29 Stat. 487 [U. S. Comp. St 1901, p. 3620]).

It was the duty of the trial court to instruct the jury that, in case they found the defendant guilty of rape, they might qualify their verdict by the words "without capital punishment," no matter what the evidence was. In the case of *Winston v. United States,* 172 U. S. 303, 19 Sup. Ct. 212, 43 L. Ed. 456, the syllabus is as follows:

> "Under the act of Congress of January 15, 1897, c. 29, § 1, by which, in all cases where the accused is found guilty of the crime of murder, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life, the authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances, but it extends to every case in which, upon view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment."

And in *Calton v. Utah,* 130 U. S. 83, 9 Sup. Ct. 435, 32 L. Ed. 870, a sentence of death upon conviction of murder in the first degree was reversed, because the judge had not called the attention of the jury to their right, under the statute, to recommend imprisonment for life, at hard labor in the penitentiary, in place of the punishment of death, and, without a recommendation to that effect, the court could impose no other punishment than death. The defendant was entitled to have the question of a qualified verdict submitted to the jury in this case.

To authorize a judgment, the verdict in a criminal case must respond to the issues submitted to the jury. Its sufficiency is determined by ascertaining whether it is responsive to and covers the offense charged in the indictment. 12 Cyc. 690. It must contain within its system, or by reference to the indictment, every material element of the crime. Where an indictment shows a crime, a general verdict of guilty in manner and form as charged in the indictment is a special finding of each element of the crime as charged, and is sufficient. Reference to the indictment is limited to the crime therein charged. In this case, while the indictment is labeled, "Indictment for Rape," the only offense charged was assault, and the verdict was a verdict merely of assault and not of rape, and, as a general verdict, it was not sufficient to authorize the judgment and sentence. The court did not submit to the jury whether defendant was guilty of assault with intent to commit rape. If the indictment had properly charged the offense of rape, this offense would have been included also, and whenever the evidence, as in this case, warrants it, the duty of the court is to instruct the jury upon the other offenses included in the crime charged. *Pratt v. State,* 51 Ark. 167, 10 S. W. 233.

The next question that arises is, did the trial court have the power and authority to inflict the death penalty under the statutes and evidence in this case? An act of January 15, 1897, provides:

"That any Indian who shall commit the offense of rape within the limits of any Indian Reservation, shall be punished by imprisonment at the discretion of the court. So much of the ninth section of chapter three hundred and forty-one of the acts of the year 1885 as is inconsistent herewith is herewith repealed." (29 Stat. 487, c. 29; Fed. Stat. Ann. vol. 6, p. 759).

Under the foregoing provision of the federal laws, we believe it was necessary for the evidence to show that the defendant was not an Indian before a question of the death penalty could be submitted to the jury. In the case of *Lucas v. United States,* 163 U. S. 612, 16 Sup. Ct. 1168, 48 L. Ed. 282, Justice Shiras, in speaking for the court, among other things, said:

"The view of the trial court, therefore, seems to have been that a finding of the fact that the deceased was a negro established the jurisdiction of the court by reason of a presumption that a negro, though found within the Indian Territory, was not a member of the tribe. In so holding, we think the court erred. If there is any presumption in such a case, it rather is that a negro found within the Indian Territory, associating with the Indians, is a member of the tribe by adoption. * * * We think, therefore, that the court erred in instructing the jury that they had a right to find the deceased was not a member of the Choctaw Nation from the mere fact that he was a negro."

Under the rule quoted above, it was necessary that the evidence show that the defendant was not an Indian, before a question of the death penalty could be submitted to the jury. The record fails to show any evidence upon this question. This being a case of life and death, where, against an express exception in the law, with no evidence except by inference only, the court assumed, in fixing the death penalty, that the defendant was not an Indian. We believe the nature and circumstances of this case strongly re-enforce the rule of evidence, as enunciated in the case of *Lucas v. United States, supra;* and in the application of that rule, in weighing the evidence offered, the court was without power or authority, under the law, in passing the sentence of death upon the defendant.

In the case of *Crain v. United States,* 163 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, Justice Harlan, delivering the opinion of the court, says:

"The record of the conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial was taken in the trial court, otherwise the judgment will be erroneous. The defendant may be guilty, and may deserve fully the punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

Under the assignments of error, the principal contention of defendant is that there was not sufficient evidence to warrant the conviction of defendant of the crime sought to be charged, and that the evidence only showed an assault with intent to commit rape. While it is a rule approved by this court that where there is any evidence to support a conviction, or where the evidence is conflicting, the appellate court will not review the record for the purpose of ascertaining or determining the weight or sufficiency of the evidence, and ordinarily the verdict approved by the trial court will be allowed to stand, but cases of this character have always been held an exception to such rule, and even exceptional in this and other particulars from the rules of procedure in ordinary criminal cases. We have examined and fully considered all the testimony as shown by transcript, and we are constrained to believe that the evidence is not sufficient to show that the assault to which prosecutrix testified was consummated.

To summarize the testimony, it shows that prosecutrix is a white woman, 21 years of age, married and living with her husband on a farm about 5 miles south of Wagoner, Ind. T., in a loghouse, with a small loghouse used as a kitchen adjoining. On the day charged in the indictment the defendant, a negro boy about 17 years old, appeared at this place about 1 p. m. The husband of the prosecutrix was working in a field about a quarter of a mile distant from the house. There was another house about 150 yards distant from the home of prosecutrix where some of her relatives resided. The defendant was carrying a Winchester rifle and a small bundle. Meeting prosecutrix in the yard, by threats he forced her to go into the kitchen, and there by force she states he ravished her. He then ran away.

Ind. T. Ann. St. § 912 (Mansf. Dig. § 1569), provides: "Proof of actual penetration into the body shall be sufficient to sustain an indictment for rape." The testimony of prosecutrix is all that is offered by the government to prove the offense. She testifies that fear did not cause her to submit, and that defendant tried to throw her down but could not. Taking into consideration the relative strength of the parties, and the fact that prosecutrix remained standing, her testimony as to her position when the act of penetration occurred, the brief time that defendant was there, and the other circumstances as shown by her testimony, this, together with the fact that no evidence was offered to show that she was otherwise injured or bruised in any way, or that her hair was disheveled, or that her clothes were torn, and the fact that no outcry was made, leads us to believe that prosecutrix was mistaken and misapprehended the real fact. The force used must have been such as might reasonably be sufficient to overcome her resistance. Under all the circumstances as shown by the evidence, the testimony of the prosecutrix does not import absolute verity. Her person and her feelings had been outraged, and her virtue violated by a lecherous degenerate whose acts and intention, at least, were such that no punishment short of the extreme could approach the adequate, and the assault was such as might reasonably cause her to honestly believe that her person had been polluted and her body penetrated. Prosecutrix's testimony showing the vulgar remark of defendant confirms our conclusion. The history of criminal trials is replete where witnesses have, through malice, misapprehension, mistake, or weakness of mind, made declarations that were inconsistent with the actual facts. In this case we are of the opinion that the evidence is not sufficient to show that the offense was consummated.

Several assignments of error are based upon the action of the court in admitting, over the objections of the defendant, evidence showing, or tending to show, that the defendant had been guilty of offenses other than the one charged in the indictment. The evidence of the witness Dyer was to the effect that about the hour of 12 o'clock on September 12th the defendant was at his place, this being about a mile distant from the home of prosecutrix, and that he, together with his wife, were at that time leaving for Wagoner. That upon their return that day he found that his house had been burglarized, and that a Winchester rifle, some clothes, and a small sum of money had been taken. Mrs. Dyer's evidence was the same. Other evidence showed that this Winchester rifle was the Winchester used in the assault upon prosecutrix. We believe all of this testimony was proper for the purpose of identification, and it was relevant to show that the defendant was near the place where the crime was committed at that time. All of this testimony was connected with, and had a natural tendency to corroborate, the direct evidence in the case.

"Evidence on the question of identity of the prisoner is permitted to take a broad range. Any fact which shows the acquaintance and familiarity of the witness testifying to the identity of defendant, is admissible." (Cyc. vol. 12, p. 592.)

Evidence covering the commission of another offense is also admissible when two crimes are so linked together in point of time or circumstances that one cannot be fully shown without proving the other. In support of this rule, see: *Mason v. State,* 42 Ala. 532; *State v. Folwell,* 14 Kan. 105; *State v. Wentworth,* 37 N. H. 196. It is also relevant to show that the accused was seen near the place of the crime, although he does not claim an alibi. Cyc. vol. 12, p. 399. Evidence covering the commission of another offense is also received to show the identity of the person, local proximity, or other facts calculated to connect the accused with the commission of the offense. *State v. Kelley,* 65 Vt. 531, 535. 27 Atl. 203, 36 Am. St. Rep. 884; *Halleck v. State,* 65 Wis. 147, 26 N. W. 572; *Commonwealth v. Choate,* 105 Mass. 451.

In *People v. Rogers,* 71 Cal. 565, 12 Pac. 679, the defendant was convicted of murder. At the trial the prosecution, against the objection of the defendant, introduced evidence tending to show that the defendant gained an entrance to the house, where the crime was committed, with instruments which had been stolen from a neighboring house at the time of a prior burglary, and that the homicide was committed with a pistol which had been taken at another prior burglary. Held, that the evidence was admissible, notwithstanding it tended to connect the defendant with the perpetration of other crimes.

The evidence of the witness Herchell Short was to the effect that defendant committed the offense of burglary or larceny, or both, in the state of Kansas, subsequent to the time alleged that the offense charged was committed. Defendant moved the court to exclude this testimony from the consideration of the jury, as tending to show an offense which had been committed by defendant in the state of Kansas, which motion was by the court overruled. This holding of the court, we believe, was error. In Wharton's Am. Crim. Law, the author, among other things, says: "It is under no circumstances admissible for the prosecution to prove independent crimes, even though of the same general character, except when found strictly within the exceptions above stated." The exceptions alluded to by the author, and as hereinbefore stated, would not embrace the evidence now under consideration. See, also, 12 Cyc. p. 406, and cases cited from almost every state.

In the case of *Boyd v. United States*, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077, Justice Harlan, delivering the opinion of the court, among other things, says:

"The principal assignments of error relate to the admission against the objection of the defendants, of evidence as to several robberies committed prior to the day when Dansby was shot, and which, or some of which at least, had no necessary connection with, and did not in the slightest degree elucidate, the issue before the jury, namely, whether the defendants murdered John Dansby on the occasion of the conflict at the ferry. * * * We are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants in that regard was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

This principle has been approved in the case of *Hall v. United States*, 150 U. S. 80, 14 Sup. Ct. 22, 37 L. Ed. 1003. See also, *Waight v. United States*, Fed. Cas. No. 17,012; *People v. Carpenter*, 136 Cal. 391, 68 Pac. 1027; *State v. Kirby*, 62 Kan. 436, 63 Pac. 752; *People v. Bennett*, 122 Mich. 281, 81 N. W. 117; *State v. Hale*, 156 Mo. 102, 56 S. W. 881.

Another error assigned, and one which we regard as fatal to the judgment below, was the refusal of the court to grant the defendant's motion for a new trial, based on the ground of certain misconduct of the Assistant United States Attorney which was prejudicial to the rights of the defendant. The record shows that the Assistant United States Attorney, who prosecuted this case, in his opening statement to the jury, stated: "That his reason for not permitting a colored man to sit upon the jury was that he did not want to compel them to sleep and eat with the negro." Also his further statement to the jury, "That the defendant had been guilty of burglary and larceny but a short time before he had committed the crime with which he stood charged, and that after the crime of rape had been committed by him, and he fled into the state of Kansas, he had been arrested for burglary committed in that state." The record further shows that the Assistant United States Attorney, in his closing address to the jury, stated and argued as follows: "I ask you, gentlemen, to convict the defendant as charged in the indictment, for I know if you do, your verdict will be flashed across the wires and be published in the newspapers throughout the length and breadth of this earth, and the colored race will throw their hats into the air." All of which remarks were duly objected to, and exceptions saved.

We believe the action of the prosecuting officer as above set forth was highly improper and constituted gross misconduct on his part. It manifested a disposition to disregard the legal rights of the defendant, and exhibited a purpose to ignore the plainest principles of law in the trial of a capital case. Such statements, coming from the Assistant United States Attorney at the time, and in the manner made, must have been highly prejudicial to the substantial rights of the defendant. The only purpose in the course pursued by the prosecuting officer was to appeal to the pride and passion, and thereby prejudice the jury against the defendant. If it was possible to poison the minds of the jury against the defendant, this conduct was well calculated to do so, and in so doing the Assistant United States Attorney abused his privilege as a public prosecutor. In the case of *People v. Fielding,* 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495, the court, in part, say:

> "While public prosecutors should not be restricted in 'fair argument, comment or appeal' to the jury, they should not be allowed to state facts not proved, or to make inflammatory appeals to passion and prejudice, or to threaten the jury with popular denunciation, or to tell the jurors that they would commit the 'unpardonable sin' if they failed to convict the defendant."

The probable effect of such appeals is to divert the attention of the jury from the evidence, prejudice them against the defendant, and prevent the exercise of sound dispassionate judgment upon the merits of the case. The approval of the trial court intensifies the effect of such prejudicial remarks, and subsequent instructions to disregard the remarks of counsel may not cure the injury already done.

After defendant's counsel had several times objected to such remarks, which the prosecutor persistently continued to make, with the approval of the court, he need not continue to make objection to such remarks, but the subsequent remarks will be held subject to the exceptions already taken. "Where the remarks of the district attorney prejudice the minds of the jury, for that reason alone the judgment should be reversed." *Brown v. Swineford,* 44 Wis. 282, 28 Am. Rep. 582; *Hall v. United States,* 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003. It is sufficient that extra professional stateents of counsel may gravely prejudice the jury and effect the verdict. *Tucker v. Henniker,* 41 N. H. 317; *State v. Smith,* 75 N. C. 306; *Fuller v. State,* 30 Tex. App. 339, 17 S. W. 1108.

The overnourished zeal of counsel, displayed in the attempt to seek conviction for crime, frequently calls for condemnation on the part of appellate courts, especially when in the closing argument to the jury the attorney for the state travels outside the evidence for his subject matter, or indulges in truculent abuse of the accused. *Smith v. People,* 8 Colo. 459, 8 Pac. 920; *Martin v. State,* 63 Miss. 505, 56 Am. Rep. 813; *Garlitz v. State,* 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

Where the county attorney, in his closing argument to the jury, repeatedly used abusive and improper language, calculated to create prejudice against the defendant, and the court, after objection made, fails to check him, and to instruct the jury to disregard his remarks, the defendant is entitled to a new trial. *State v. Baker,* 57 Kan. 541, 46 Pac. 947.

A reference to other offenses committed by a defendant on trial, but of which other offenses there is not evidence, is improper. *State v. McCool,* 34 Kan. 617, 9 Pac. 745.

In determining the effect of improper statements made by an attorney in the closing argument to the jury, the strength of the testimony against the party complaining will be considered, and, if the improper statements may have determined the verdict, a new trial will be granted. *State v. Shelton,* 6 Kan. App. 662, 49 Pac. 702.

When remarks of the prosecuting attorney to the jury, by appeal either to their fears or vanity, tend to coerce and cajole them, then a verdict of conviction is error. *People v. Lange,* 90 Mich. 454, 51 N. W. 534.

On a trial for murder, where the district attorney, in summing up, by his remarks, appeals to the feelings of the jury, so as to probably coerce them into finding a verdict against the defendant, and it was reasonably doubtful whether he had a fair trial, judgment of conviction will be reversed. *People v. Mull,* 167 N. Y. 247, 60 N. E. 629; *People v. Kramer,* 117 Cal. 647, 49 Pac. 842, expressly holds that improper arguments of counsel, not based upon the evidence, in an address to the jury, are not justified by the fact that opposing counsel had already committed like impropriety.

Where, in a prosecution for burglary, an officer testified that he had searched the prisoner's trunk, it was reversable error for the prosecution to ask how he came to make the search, knowing that the answer would show that the prisoner was suspected of another theft, though the court sustained an objection to the question after the officer's answer to that effect had been given.

In *People v. Valliere,* 127 Cal. 65, 59 Pac. 295, the court, in part, say:

"In my opinion the examination was incurable, and the statements sustained in the closing address were an outrage against justice, which should not be allowed to pass."

In the case of *People v. Aiken,* 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512, the court, in part, says:

"It must also be remembered that, however heinous the crime, and however difficult it may be to establish it by the usual and approved means of procedure, and no matter how firmly the public prosecutor and the community at large may be satisfied of the guilt of the accused, and even though in fact he may be guilty, the rules and methods of trial, permitted to be relaxed or disregarded in his particular case, with perhaps the laudable object and desire that justice may be done, must nevertheless, as a natural consequence of the ways of our jurisprudence, appear hereafter, as so relaxed or disregarded, as precedents to be used against all persons accused of crime, to vex the innocent as well as the guilty. There is therefore no safety and justice in allowing the supposed merits of a particular case to override and set aside, even for a moment, the barriers that our Constitution and laws have hedged about the citizen when arraigned and put upon trial for an alleged crime."

A public prosecutor is presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner, and appeals to prejudice, seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and seeks no conviction through the aid of passion, sympathy, or resentment. The only way to secure fair trials is to set aside the verdicts so procured.

It is a matter of the greatest concern to care for and protect from violence and outrage the womanhood of our country. The protection of the mothers, wives, and daughters of our land, and the preservation of the sanctity and security of our homes, all depend upon the certainty and promptness with which cases of this character shall be visited with the just penalty of the law, and it is the duty of the courts and juries to give it effect. But a criminal trial should be an intelligent, conscientious investigation under the laws, with every favor for life, and even reasonable doubt as to the facts, in favor of the prisoner. The law of the land guarantees to every one accused of crime, regardless of race or color, whether of high or low degree, whether rich or poor, a fair and impartial trial. Whether the defendant be innocent or guilty, in our opinion he has not been adjudged guilty in accordance with law, because he has not had a fair and impartial trial, which the law prescribes for a person charged with crime.

The record discloses other rulings, arising during the conduct of the trial, that would be difficult to defend. The trial of this case might well be termed a Tragedy of Errors. The questions already discussed are sufficient to dispose of this case, and it should be submitted to another jury to the end that all competent proof may be given in the regular and orderly way, and all the questions involved presented in that temperate and dispassionate manner which is so important in the trial of a capital case, and so essential to the protection of all the rights of the accused.

It is the opinion of this court that, for the reasons set forth herein, the judgment of the United States court for the Western District of the Indian Territory is hereby reversed, the cause remanded, and a new trial ordered.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

MOSES WELLS v. TERRITORY.

No. 1995, Okla. T. Opinion Filed December 9, 1908.

(98 Pac. 483.)

1. **INDICTMENT AND INFORMATION—Duplicity.** Under the provisions of Code Cr. Proc. sec. 224 (Wilson's Rev. & Ann. St. 1903. sec. 5360), providing that: "An indictment must charge but one offense; but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment, and the accused may be convicted of either offense"—an indictment is bad for duplicity that charges two distinct offenses in one count—that is, the uttering of a check knowing it to be forged, and the forging of the indorsement thereon and then uttering the same—and a demurrer thereto should be sustained.

2. **CRIMINAL LAW—Immaterial Variance.** Section 482, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, sec. 5618), provides that: "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Where the indictment charges that the check was delivered to Katz Bros., a firm composed of Jacob Katz and Isaac Katz, partners, doing business under the firm name of Katz Bros., if the check was, in fact, passed to Katz Bros., a corporation, doing business under the corporate name of Katz Bros., of which corporation Jacob Katz and Isaac Katz were stockholders and officers, such variance is not material.

3. **FORGERY—Intent—"Uttering Forged Check."** To constitute the offense of uttering a forged check, there must be an intent to cheat and defraud, and a knowledge of the falsity of the instrument.

4. **SAME—Instructions—Knowledge of Accused.** Under a statute defining the offense of uttering forged instruments knowing them

to be forged, it is error to instruct the jury that they should find that defendant had knowledge of the forgery. "If he had notice of any suspicious facts or circumstances which were sufficient to put a reasonably prudent and cautious person upon inquiry, which, if followed up, would have led to knowledge of its forgery, then he would be chargeable with notice of the character of the check."

5. **SAME—Guilty Knowledge.** Guilty knowledge that an instrument is forged may be found if the jury is satisfied from the facts and circumstances shown by the testimony that the defendant had reason to believe it was forged; but the inference is for the jury, and does not follow of necessity.
(Syllabus by the Court.)

Error from District Court, Payne County; J. H. Burford, Judge.

Moses Wells was convicted of forgery, and brings error. Reversed and remanded.

Plaintiff in error, Moses Wells, hereinafter referred to as "the defendant," was prosecuted by indictment for the crime of forgery, in the district court of Payne county, Okla. T., at the April term, 1906, which indictment, omitting the formal parts, reads as follows:

"Territory of Oklahoma v. Moses Wells. Indictment. Of the April term of the district court of the first judicial district of the territory of Oklahoma, within and for Payne county, in said territory, in the year of our Lord, one thousand nine hundred and six, the grand jurors, having been first duly chosen, selected, impaneled, sworn and charged to inquire of the offenses against the laws of the territory of Oklahoma, committed within said county, in said territory of Oklahoma upon their oath aforesaid, in the name and by the authority of the territory of Oklahoma, do find and present: That at and within said Payne county in said territory, on the twenty-fifth day of July, in the year of our Lord one thousand nine hundred and five, Moses Wells, late of the county aforesaid, on the twenty-fifth day of July, in the year of our Lord one thousand nine hundred and five in the county of Payne nad territory of Oklahoma aforesaid, then and there unlawfully and feloniously sell, exchange and deliver to Katz Brothers, a firm composed of Jacob Katz and Isaac Katz, partners, doing business under the firm name of Katz Brothers, for the consideration of about thirteen dollars of good and lawful money of the United States and of the value of about thirteen dollars, the exact value and description of which is to the grand jurors unknown, and various articles of clothing, goods, wares and merchandise of about the value of eight dollars, the exact description and value of which is to the grand jury unknown; a forged and counterfeited check of the tenor, purport and effect following: 'Billings, Oklahoma, July 18, 1905. No. 8. Citizens' Bank of Billings: Pay to Paul Brown, or bearer, $21.00. Twenty-one Dollars. H. Biffer. (Shadinger Ptg. Co. Abilene, Kan.)'—which instrument had endorsed on the back thereof, 'Paul Brown,' with the felonious intent to have the same uttered and passed, and he, the said Moses Wells, before delivering said forged and counterfeited check to Katz Brothers, wrote and endorsed on the back thereof the name 'Paul Brown,' and he, the said Moses Wells, at the time he so sold, exchanged and delivered the said forged and counterfeited check to said Katz Brothers, knew the same to be forged and counterfeited, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the territory of Oklahoma."

To this indictment the defendant entered a general demurrer, which was, by the court, overruled, to which ruling of the court the defendant excepted. The case coming on for trial by a jury, the territory offered its evidence and rests. Whereupon the defendant moved the court to direct a verdict of not guilty, for the reasons: First, that the evidence offered by the territory is not sufficient to sustain a verdict of guilty; second, that there is a fatal variance between the allegations of the indictment and the proof offered in the case—which motion was, by the court, overruled, and the defendant excepted. Evidence was then introduced by the defendant and the territory and the defendant renewed his motion to direct a verdict, which motion was overruled, and exception taken. The court instructed the jury, arguments were made by counsel, and the jury retired to deliberate, and thereafter returned into court their verdict, which was a general verdict of guilty. Motion for new trial was regularly made, and on the 23d day of April, 1906, the court overruled said motion; to this the defendant duly excepted. The court then sentenced defendant to confinement in the territorial penitentiary for a term of two years, to all of which the defendant duly excepted, and gives notice of an appeal, which appeal was duly perfected to the Supreme Court of the territory of Oklahoma. Upon the admission of Oklahoma as a state, the cause was transferred to the Supreme Court of Oklahoma. Under the provisions of the act creating the Criminal Court of Appeals, the cause was transferred to, and is now before, this court for review.

Lowry & Lowry, for plaintiff in error.—

On question of fatal variance between allegation of partnership and proof of corporation: *Cutler v. Territory,* 8 Okla. 101; *State v. Murphy,* (R. I.) 16 L. R. A. 550; *State v. Harrison,* 69 N. C. 143; *United States v. Keen,* Fed. Cas. No. 15, 510 (1 McLean, 429); *Sykes v. People,* 132 Ill. 32.

On necessity of proof of guilty knowledge: Wilson's Rev. & Ann. St. 1903, c. 25, §523; A. & E. Enc. Law (1st Ed.) Vol. 1, 491; 1 Whar. Crim. Law, § 742; *Sands v. Com.,* 20 Gratt. (Va.) 800; *Elsey v. State,* 47 Ark. 572; *Parker v. People,* 97 Ill. Lean, 429, *Sykes v. People,* 132 Ill. 32.

W. O. Cromwell, Don C. Smith, J. H. Kline, and W. C. Reeves, Asst. Atty. Gen., for defendant in error.—

On the sufficiency of the indictment: *Heatley v. Territory,* 15 Okla. 72; *Baysinger v. Territory,* 15 Okla. 386.

On the question of variance: *Connella v. Territory,* 16 Okla. 365; *State v. Hastings,* 53 N. H. 452; *United States v. Mason,* 26 Fed. Cas. 1192.

DOYLE, JUDGE. The first assignment of error relied on by the defendant to reverse this case is the overruling of the defendant's demurrer to the indictment. The third ground of said demurrer is as follows: "(3) That said indictment upon its face attempts to charge more than one offense against the laws of the territory of Oklahoma." Section 224, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, § 5360), prescribes that an indictment must charge but one offense; but where the same acts may constitute different offenses, or the proof may be uncertain as to which of two or more offenses accused may be guilty of, the different offenses may be set forth in separate counts in the same indictment, and the accused may be convicted of either offense.

We believe the indictment is bad for duplicity, in charging two distinct offenses in one count; that is, the uttering of the check, knowing it to be forged, and the forging of the endorsement thereon, and then uttering the same. The offenses are distinct, arising upon different acts, and each constitutes the offense of forgery in the second degree. Under the foregoing provisions of the Code, it was necessary to set forth the separate counts, the uttering and the selling or exchanging of said check, knowing it to be forged, and the forging of the endorsement thereon, and the selling, exchanging, and delivery with the forged endorsement.

It is a general rule that when a statute makes it an offense to do some one or another act, naming them disjunctively, either of which would constitute one and the same offense, the acts may be charged conjunctively in one count as constituting a single offense, and it has been held that: "Where the making and uttering of a ficitious instrument is one continuous transaction, they may be properly charged in one count as a single offense." 19 Cyc. p. 1410; *People v. Dole,* 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; *Selby v. State,* 161 Ind. 667, 69 N. E. 463; *State v. Greenwood,* 76 Minn. 207, 78 N. W. 1044, 1117. Having examined the foregoing cases, we think there is a distinctive difference between these cases and the case at bar.

"Possession of forged paper by a defendant with a claim of title thereunder, if unexplained, raises a conclusive presumption that he forged it, or procured it to be forged." (19 Cyc. p. 1412.)

"Nevertheless, proof that the defendant uttered a genuine instrument, with forged indorsement in blank by the payee thereof, raises no such presumption." (19 Cyc. p. 1413.)

In the case of *Miller v. State,* 51 Ind. 405, Worden, J., in part, says:

"We do not think it can be laid down as a rule of law that the uttering and publishing as true of a commercial instrument, with the name of a payee forged thereon, raises a presumption that the person uttering and publishing is guilty of forging the indorsement."

Section 221, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, § 5357), provides the indictment must contain:

"(2) A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

And section 222, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, § 5358), provides:

"The indictment must be direct and certain as it regards: * * * (2) The offense charged."

The aforesaid indictment does not conform to the requirements of our Criminal Code. It is charged that the defendant did unlawfully and feloniously sell and deliver to Katz Brothers, for the consideration named, a forged and counterfeited check. It is further charged in the same count that the defendant, before delivering said forged and counterfeited check, wrote and indorsed on the back thereof the name of "Paul Brown." It appears from the copy of the check set forth that the same purports to be signed by H. Biffer, as drawer, and is payable to Paul Brown, and it is alleged that the name of Paul Brown was indorsed on the back of the check in blank. Such check at the time of delivery might have been a forged and counterfeited check by reason of the forging of the name of H. Biffer, as drawer, although the signature of Paul Brown, as indorser, might have been genuine; or such check might have been a forged and counterfeited check at the time of such delivery, by reason of the forgery thereon of the name of Paul Brown as indorser, although the check might have been a genuine check of H. Biffer, drawer. The defendant could not, in advance, know from the allegations of the indictment whether he was to be tried for forging the name of Paul Brown, as indorser, to a genuine check, or of knowingly uttering the check to which the name of H. Biffer had been forged. Under the indictment, proof that he knowingly uttered and forged a counterfeited check to which the name of H. Biffer, as drawer, had been forged, even though the signature of Paul Brown, indorsed thereon had been genuine, would have been sufficient to convict the defendant; or proof that he knowingly uttered the genuine check of H. Biffer with the forged signature of Paul Brown thereon, as indorser, knowing the same to be forged, would have been sufficient to convict the defendant.

On the trial it was controverted that the defendant sold, exchanged, and delivered the alleged forged check. The territory introduced the testimony of H. Biffer, who testified that the signature to the check was not his signature; and also introduced testimony tending to show that the defendant, Moses Wells, at the time he delivered the check, wrote on the back thereof the name of Paul Brown. The defendant testified that the signature of Paul Brown was genuine, and was written thereon by the person from whom he received the check, and whom he had known as Paul Brown, and that he did not write the indorsement thereon, The defendant also introduced evidence tending to show that the signature of H. Biffer to the check was genuine.

Under this indictment the defendant was compelled, by proof, to meet the allegations of two distinct and separate offenses, upon either of which the jury might find him guilty of forgery; and he could not know in advance by any of the allegations of said indictment upon which of the two the territory might rely. The jury may have found, in fact, that the signature of H. Biffer to the alleged forged check was genuine, and convicted the defendant of uttering a check with the forged name of Paul Brown thereon; or the jury may have found from the evidence that the signature of Paul Brown was genuine, as claimed by the defendant, but that the signature of H. Biffer was forged, and that the defendant knowingly delivered the check with said forged signature of H. Biffer to Katz Brothers with the intent of having the same passed as genuine. We believe that the indictment charges more than one offense. The second offense charged, if not forgery, under the proof, might be false pretense, or false personation; and it is not sufficiently direct and certain. We are, therefore, of opinion that the defendant's demurrer to the indictment should have been sustained.

The second assignment of error is that the court erred in refusing to instruct the jury, at the close of the testimony of the territory, to find a verdict of not guilty. Section 373, Code Cr. Proc. (Wilson's Ann. St. 1903, § 5509), provides:

> "If at any time after the evidence on either side is closed the court deem it insufficient to warrant a conviction it may advise the jury to acquit the defendant, but the jury are not bound by the advice, nor can the court for any cause prevent the jury from giving a verdict."

In this case we believe there was evidence sufficient to go to the jury. However, defendant contends that there was a fatal variance. The indictment alleges that the alleged forged check was, by the defendant, sold, exchanged, and delivered to Katz Brothers, a firm composed of Jacob Katz and Isaac Katz, partners, doing business under the firm name of Katz Brothers. The proof was that Katz Brothers was a corporation, organized under the laws of the territory of Oklahoma. At the close of the testimony defendant again moved the court to instruct the jury that in the opinion of the court the evidence was not sufficient to sustain a verdict of guilty, and that there was a fatal variance between the allegations of the indictment and the proof submitted. This motion was, by the court, overruled, and exception taken. Whereupon the defendant requested the giving of three separate instructions, all to the same effect. No. 3 reads as follows:

> "Instruction No. 3. The burden is upon the territory in this case to establish by the evidence, beyond a reasonable doubt, that the defendant did sell or exchange to Katz Brothers, a firm composed of Jacob Katz and Isaac Katz, partners, doing business under the firm name of Katz Brothers, the forged and counterfeited check set forth in the indictment, and proof of the selling or exchanging said check to Katz Brothers, corporation, duly incorporated, is not sufficient to sustain the allegation of the indictment. Refused; and excepted to by the defendant. John H. Burford, Judge."

The court instructed the jury that such variance was not material, which instruction reads as follows:

> "Instruction No. 4. The indictment charges that the check was delivered to Katz Brothers, a firm composed of Jacob Katz and Isaac Katz, partners doing business under the firm name of Katz Brothers. If the check was, in fact, passed to Katz Brothers,

a corporation, doing business under the corporate name of Katz Brothers, of which corporation Jacob Katz and Isaac Katz were stockholders and officers, such variance is not material."

To which instruction defendant specifically objected and excepted. The intent to cheat and defraud is the essential element of the crime of forgery. Section 523, c. 25, Wilson's Rev. & Ann. St. 1903, provides:

"Sec. 523. Every person who sells, exchanges or delivers for any consideration, any forged or counterfeited promissory note, check, bill, draft, or other evidence of debt, or engagement for the payment of money absolutely, or upon any contingency, knowing the same to be forged or counterfeited, with intent to have the same uttered or passed, or who offers any such note or other instrument for sale, exchange or delivery for any consideration, with the like knowledge and intent, or who receives any such note or other instrument upon a sale, exchange or delivery for any consideration with the like knowledge and intent, is guilty of forgery in the second degree."

The foregoing provision sets forth the offense sought to be charged by the indictment in this case; and by this provision, the gravamen of the offense is the sale, exchange, or delivery of the instrument for a consideration, knowing it to be forged or counterfeited, with the intent to cheat and defraud. The defendant, testifying, admitted the sale, exchange, and delivery of the check to Katz Brothers. The descriptive words in the indictment, as to who composed the firm of Katz Brothers was entirely unnecessary, and should be regarded as surplusage.

Wharton says:

"There can, it is well said, be no use in requiring proof of allegations which are impertinent; the identity of those which are essential to the claim or charge with the proof is all that is material." (Whar. Crim. Ev. [9th Ed.] par. 139.)

"It is a general rule which runs through the whole criminal law that it is sufficient to prove so much of the indictment as shows the defendant has committed the substantive crime therein specified; and, in the case of redundant allegations, it is sufficient to prove part of what is alleged according to its legal effect, provided, that that which is alleged but not proved be neither essential to the charge, nor describe or limit that which is essential." (1

Chitty Crim. Law, 250; *State v. Myers,* 99 Mo. 107, 12 S. W. 516.)

Technical errors or defects which do not affect the substantial rights of the parties are to be disregarded under our statute. Section 482, c. 68, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, § 5618), provides:

> "Sec. 482. On an appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

We believe that the defendant was not prejudiced by the alleged variance in any way. We are, therefore, of opinion that the trial court rightfully refused the instructions offered by the defendant, and correctly stated the law applicable to this feature of the case in the instruction given.

In the third assignment of error it is claimed that the court committed error in admitting certain testimony offered by the territory, over the objection of the defendant. We do not deem it necessary to comment upon this assignment, except to say that, over the objection as made, the testimony was competent.

The fourth and last assignment of error is predicated upon instructions given, Nos. 4, 5, and 6. Instruction No. 4 has been heretofore discussed. The objection to instruction No. 6, we believe, was not well taken.

Instruction No. 5 reads as follows:

> "If the defendant sold the check to Katz Brothers at the time and place alleged, and said check was not the genuine check of H. Biffer, then a material question to be determined by you is, whether or not he knew it was forged at the time he obtained the goods and money on it from Katz Brothers. If he had no knowledge that it was forged, or had no knowledge of any facts cannot be convicted in this case. In determining the question as relating to its execution which would put a reasonably prudent and cautious person upon inquiry as to its genuineness, then he to whether he had knowledge or notice that the check was a forged instrument at the time it was delivered to Katz Brothers, you will take into consideration the evidence relating to the handwriting on the check, the indorsement of the name of Paul Brown on the back of the check, the evidence as to who wrote said name

on the back of the check and where it was written, and whether the indorsement on the back of the check was written by the same person who wrote the name of Paul Brown in the face of the check, and all facts and circumstances in evidence which would in any manner inform the defendant, or notice, or create in his mind a reasonable suspicion as to its genuineness, and if the defendant himself forged the check, or if he had notice that it was forged, or if he had notice of any suspicious facts or circumstances which were sufficient to put a reasonably prudent and cautious person upon inquiry, which, if followed up, would have led to knowledge of its forgery, then he would be charged with notice of the character of the check."

Section 523, c. 25, Wilson's Rev. & Ann. St. 1903, hereinbefore set forth, expressly provides that a person, to be guilty of forgery in the second degree, must sell, offer for sale, exchange or deliver for a consideration, or receive for a consideration, a forged or counterfeited check, etc., knowing the same to be forged or counterfeited. Under this provision of the law requiring knowledge of the character of the instrument, we believe that the court committed error in using the qualifying language in the foregoing instruction; and we believe the court erred in so instructing the jury as to what constituted or amounted to knowledge on part of the defendant.

"To constitute uttering and publishing a forged instrument, it is necessary that there should be knowledge on the part of the defendant that the document is false and fraudulent." (A. & E. Enc. of Law [1st Ed.] vol. 8, 491.)

Mr. Wharton says:

"In cases of uttering and publishing a scienter must be averred, though it is sufficient that this averment should be given in general terms." (Whar. Crim. Law, vol. 1, § 742.)

"Uttering is offering a forged instrument knowing it to be such, whether such offer is accepted or not, with a representation by words or action that it is genuine, with an intent to defraud; and it is a public offense. While the making of a forged instrument and the uttering of it by the same person as one transaction constitute but one offense, one may be guilty of uttering an instrument forged by another; but to constitute the offense it is essential that the person uttering the forged instrument have actual knowledge of its falsity. It is not sufficient that a person uttering an instrument has reasonable cause to believe it was forged." (19 Cyc. p. 1388.)

In the case of *Elsey v. State,* 47 Ark. 572, 2 S. W. 337, Mr. Justice Battle, speaking for the court, in part says:

> "Another question in this case, presented by the evidence. and the instruction requested by appellants and refused by the court, is, what is necessary to constitute an uttering? To utter and publish a document is to offer, directly or indirectly, by words or action, such document as good. To constitute the offense of uttering and publishing a forged writing, it is necessary that there be an intent to defraud, and that there should be a knowledge of the falsity of the document."

In *Carver v. People,* 39 Mich. 786, that eminent jurist, Justice Cooley, expressing the opinion of the court, says:

> "Many of the exceptions relied upon in this case appear to us frivolous, but two which are taken to the charge are fatal to the conviction The circuit judge instructed the jury that if they found the accused uttered the instrument having reasonable cause to believe it was forged, they should find them guilty. This was a serious error. The statute punishes those only who utter and publish forged instruments knowing them to be forged, but this instruction required a conviction if the jury believed the accused were merely negligent in uttering an instrument in respect to which the facts should have put them upon their guard. No doubt, if the jury are satisfied the accused had reason to believe the instrument was forged, they might find the guilty knowledge. But knowledge of a thing and reason to believe in its existence are not identical, and the finding of the one is not equivalent to the finding of the other. The one falls short of the other exactly as gross carelessness falls short of criminal intent. It is a state of things from which knowledge might be inferred, and under the circumstances of this case probably ought to have been inferred; but the inference was one the jury might or might not draw, according as they were or were not satisfied of the privity of the accused with the fraudulent practices of Dingman. They were not required to deduce the conclusion if they had reasonable doubts of the guilty knowledge."

The forgoing authorities properly state the law as we find it. The instruction was clearly erroneous, and misleading to the jury. The defendant's objection to this instruction was well taken.

For the reasons stated, the judgment of the district court of Payne county, Okla. T., is reversed, and the cause remanded to the district court of Payne county, Okla..

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

BRYAN REED V. TERRITORY.

No. 2061, Okla. T. Opinion Filed December 10, 1908.

(98 Pac. 583.)

1. **INDICTMENT AND INFORMATION—Language of Statute.** When an indictment uses substantially the same language in charging an offense as is used in the statute in creating the offense, the indictment is sufficient.

2. **SAME—Jury—Motion to Set Aside Indictment—Sufficiency—Affidavit—Selection and Drawing of Panel—Officer Who may Act as Deputy.** (a) A general allegation that the grand jury which found the indictment was not properly and legally drawn is too indefinite and uncertain to require notice.

   (b) Under the act of Congress of February 9, 1906, 34 Stat. 11, c. 155, a deputy clerk could perform the purely ministerial duties directed to be performed by the clerk of the court, in the matter of recording the list of the jurors upon the journals of the court, and certifying to the correctness thereof.

   (c) An application to take evidence to sustain a motion to set aside an indictment, upon the ground that the jury was not properly drawn and impaneled, must be supported by an affidavit in which the allegations of the motion are alleged to be true.

   (d) It is not error to overrule a motion to set aside an indictment, when the facts alleged in the motion are not sufficient to show that the motion should be sustained, if proven to be true.

3. **SAME—Pleas in Abatement—Pendency of Other Indictment or Information—Continuance — Grounds — Sufficiency of Application.** (a) The fact that an indictment or information is pending against a defendant will not, of itself, prevent a grand jury from finding another indictment against the defendant for the same offense.

   (b) The pendency of an indictment or information against a defendant, when there has been no jeopardy upon it, cannot be pleaded, either in abatement or bar to a second indictment or information for the same offense.

   (c) The pendency of an indictment or information, when there has been no jeopardy upon it, cannot be set up as ground for continuance, when trial is sought on a new indictment or information presented against the defendant for the same offense.

(d) An application for a continuance should allege that the defendant could not prove, by other witnesses, the same facts which he desires to prove by the absent witness, unless the testimony of the absent witness is intrinsically more valuable than that of the witnesses by whom the same facts could be proven, and then the facts which make this true must also be stated in the application.

(e) An application for a continuance, which consists of a statement of negative conclusions of fact, is not sufficient.

4. **CRIMINAL LAW—Evidence by Inspection by Jury—Contents of Bottle.** It is not error to permit a jury to inspect, look at, and smell the contents of a bottle which has been properly identified and admitted in evidence and is alleged to contain whisky.

5. **SAME—Evidence—Judicial Notice—Geographical Facts.** (a) Courts of this state take judicial notice of the boundaries of the state and of the counties in the state, and also of the geographical locations and positions of the towns and cities within their jurisdictions.
(b) See sufficient proof of venue.

6. **INTOXICATING LIQUORS—Sale Without License—Evidence—Sufficiency.** See case where there was sufficient proof on part of the state of the fact that the defendant did not have license to retail malt, spirituous, or vinous liquors.

(Syllabus by the Court.)

Appeal from District Court, Payne County; J. H. Burford, Judge.

Bryan Reed was convicted of selling intoxicating liquor without a license, and appealed to the Supreme Court of Oklahoma Territory, whence the cause was transferred under the Constitution of Oklahoma and the enabling act to the Supreme Court of that state, and from that court to the Criminal Court of Appeals. Affirmed.

Bryan Reed (hereinafter called defendant) was convicted in the district court of Payne county on the 11th day of October, 1906, of the offense of having sold intoxicating liquor at retail without first having obtained a license therefor. A motion for a new trial was made and overruled, and on the 1st day of November, thereafter, defendant was sentenced by the court to pay a fine of $300 and costs. An appeal was taken to the Supreme Court of Oklahoma Territory. Upon the admission of the state of Oklahoma into the Union, under the terms of the Constitution and the enabling act, the case was transferred to the Supreme Court of the state. When the Criminal Court of Appeals was created, as directed by law, the Supreme Court transferred the case to this court.

Burdick & Reece, for appellant.—

On question of error in permitting jury to smell bottle in evidence: *State v. Lindgrove,* 1 Kan. App. 51, 41 Pac. 688; *Wadsworth v. Dunnam,* 117 Ala. 661, 23 So. 699; *State v. Eldred,* 8 Kan. App. 625, 56 Pac. 153; *State v. Reynols,* 5 Kan. App. 519. 47 Pac. 573; *State v. Toggins,* 10 Kan. App. 455, 62 Pac. 247.

On question of burden of proving non-existence of license: Wharton on Criminal Evidence, 720; *Garver v. Territory,* 5 Okla. 342; *United States v. Nelson,* (1886) 29 Fed. 202; *Pendergast v. City of Peru,* 20 Ill. 51 (10 Peck); *State v. Schwerter,* 27 Kan. 449; *Commonwealth v. Moglan,* 119 Mass. 109.

W. C. Reeves, Asst. Atty. Gen., and *Fred S. Caldwell,* for the Territory.

FURMAN, PRESIDING JUDGE (after stating the facts as above.) The defendant complains that the trial court erred in overruling his demurrer to the indictment. The specific point relied upon is that the indictment charges that the defendant did sell at retail, for the price of 25 cents, to James Hoggatt "one half-pint of spirituous liquors, to-wit, whisky, without first having complied with the provisions of law and obtained a license as a vendor of malt, vinous, and spirituous liquors."

The statute upon which the indictment is based is in this language:

"Any person who shall sell at retail or give away upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks without first having complied with the provisions of this act, and obtained a license as herein set forth," etc. (Wilson's Rev. & Ann. St. 1903, § 3407.)

While it is true that the exact language of the statute is not followed in the indictment, yet the words used are of similar and equal import with those used in the statutes, and the indictment substantially charges the offense named in the statute, and is therefore sufficient. *Weston v. Territory, ante,* p. 407.

Second. The defendant complains of the action of the trial court in refusing to sustain his motion to dismiss the indictment upon the ground that the grand jury was not regularly drawn. The general charge that the grand jury was not properly and legally drawn is too uncertain and indefinite to require notice. The specific allegations of irregularity state that the deputy clerk performed duties which, under the statute, should have been discharged by the clerk. It is true that section 1 of the act of Congress of February 9, 1906, 34 Stat. 11, c. 155, providing for the selection of grand and petit jurors in Oklahoma Territory, does state that, after the names of the jurors have been selected, the clerk shall record said list upon the journal of the court and certify to the correctness thereof. And the statute further provides that, as soon as said list is completed and recorded, the clerk of the district court shall forthwith write each name upon separate pieces of paper and place them in a box, etc. If these acts required the exercise of judicial powers, then they could not have been performed by the deputy clerk in the absence of a statute giving the deputy this power. But it appears upon their face that these were purely ministerial acts, and it was therefore within the power of the deputy clerk to perform them; and his action is just as regular and binding as if it had been performed by his principal. 7 Cyc. p. 248, is as follows:

> "In the absence of any statutory provision or implication to the contrary, a deputy clerk is authorized to perform any official ministerial act that may be done by his principal, except to make a deputy. Thus it has been held that a deputy clerk may administer oaths, take affidavits and acknowledgements, take claims of witnesses for attendance, approve bonds, make certificates, issue and test writs, draw the names of grand jurors, and order the seizure of personalty in an action of claim and delivery."

The defendant filed an application to take evidence in support of his motion to set aside the indictment. This application was based on section 5399, Wilson's Rev. &Ann. St. 1903, which is, in part, as follows:

> "To enable the defendant to make proof of the matter set up as grounds for setting aside the indictment, the defendant may file his application before any court of record in the county,

setting out and alleging that he is indicted in the district court, naming it, and setting out a copy of his motion to set aside the indictment, and alleging all under oath, that he is acting in good faith, and praying for an order to examine witnesses in support thereof."

It will be observed that the statute in express terms states that this application must allege "all under oath." The affidavit in this case fails to comply with this statute, because it does not allege that the facts stated in the application are true. It was therefore not sufficient to authorize the court to make an order to take evidence in support of the motion to set aside the indictment. Two things must concur before a court would be authorized to make the order prayed for: First. The facts alleged in the application must be sufficient, if true, to set aside the indictment which we have held was not true of the application in this case. Second. The affidavit must state that the allegations made in the application are true. This was not done in the affidavit. For these reasons there was no error in the action of the court in overruling the motion and refusing to take evidence.

Third. Defendant complains that the trial court erred in overruling his application for a continuance. The first ground relied upon was that there was then pending in the probate court of Payne county an information against the defendant for the same offense. and that defendant had an agreement with the county attorney that the case so pending in the probate court should be continued to await the result of some other case pending on appeal in the Supreme Court of the territory. It is almost universally recognized that a grand jury can find a valid indictment against a defendant, notwithstanding the fact that another indictment or information is pending against the accused for the same offense, and the pendency of the other indictment or information, when there has been no jeopardy on it, cannot be pleaded either in abatement or in bar of the second indictment. The indictment having been legally returned into court, it was the duty of the court to dispose of it, just as if the information was not pending.

The second ground relied upon for the continuance was the absence of R. B. Bryan, who was alleged to be a material witness for the defendant, and who was at that time in the territory of New Mexico. There are two objections to the motion for a continuance: First. It does not allege that the defendant could not prove, by other witnesses, the same facts desired to be proven by the absent witness. In the case of *Murphy et al. v. Hood & Lumley*, 12 Okla. 595, 73 Pac. 261, the Supreme Court of Oklahoma Territory held that this omission was fatal to an application for a continuance. While we concur in this view as a general proposition, yet we do not desire to be understood as holding that it should be enforced in all cases. It might occur that cases may arise in which the testimony of an absent witness might be intrinsically more valuable than that of any other witnesses available. When such contingency arises, the application for a continuance should state the facts fully which would take the case out of the general rule. Secondly. The application for a continuance, omitting the question of diligence, stated that:

> "That affiant believes said witness will prove the following facts, to-wit: 'That the said R. B. Bryan, on the 12th day of May, 1906, was a resident of the town of Glencoe, Payne county, territory of Oklahoma, and the owner and proprietor of a drug store in said town, and that Bryan Reed worked for him as a clerk in said drug store; that said R. B. Bryan was then giving his personal attention to said business, and was in his said store as usual on the 12th day of May, 1906, and that his said clerk, Bryan Reed, was present in the store on that day; that he is well acquainted with James Hoggatt, and that said person did not purchase or obtain any whiskey or any spirituous or intoxicating liquor on said 12th day of May, 1906, or at any other time, from any one in said drug store or from Bryan Reed; that said R. B. Bryan and Bryan Reed were both present in the store at work together throughout the said 12th day of May, 1906, as upon other days, and that said R. B. Bryan would have seen said James Hoggatt if he had obtained or purchased any whisky or other intoxicating liquor from said Bryan Reed on said day or at any other time."

It is seen that the evidence of the absent witness, as set out in the application for the continuance, consisted so far as this case is concerned, in statements of negative conclusions of fact, and that it shows upon its face that if this defendant was not guilty of the offense charged there was better evidence of this than that on account of which the continuance was sought. No attempt was made to procure the testimony of James Hoggatt, and a continuance on account of his absence was not sought. There was, therefore, no error in the action of the court in overruling the application for a continuance.

Fourth. It appears from the record, that upon the trial of this cause a government witness produced a bottle which he testified contained whisky, and identified it as being the bottle of whiskey that he had purchased from defendant. This bottle was introduced in evidence, and the jury were permitted to look at and smell the contents of the bottle. To all of which the defendant duly objected and excepted. Counsel in their brief say "the evidence must either be oral or written, and the jury cannot act as witnesses as well as triers of facts." It is true that counsel cite cases from the Supreme Courts of Kansas and Alabama in support of their position, but we cannot agree with their contentions. Both upon reason and authority we submit that there are three channels through which tribunals of fact receive evidence, namely, inspection, documents, and oral testimony. No jury ever decided any controverted question of fact without using one or more of their five senses. The senses of hearing and sight are used in every case for more purposes than that of simply seeing the witnesses and hearing their words. Through these senses impressions are made upon the minds of the jurors which cause them to accept as true, or reject as false the statements made by the several witnesses. Thus the exercise of these senses, on the part of the jurors, affects their verdicts. But this does not make them witnesses in the case. They have simply tested the credibility of the witnesses by the personal experience and observations of the jurors. A thousand things in the lives and observations of the jurors may influence them in doing this, but a knowledge of these things has never been regarded as making the jurors witnesses in the case. In this case the jurors were permitted to smell the contents of the bottle offered in evidence, to enable them to decide as to whether the prosecuting witness had told the truth about its being whiskey. By this the jurors did not learn any facts independent of the evidence; they simply tested the facts in evidence by the use of one of their senses. Or, in other words, they were permitted to hold an autopsy on part of the evidence already before them, to test its true character.

Our statute permitting the inspection of places and premises, referred to in the evidence, when, in the opinion of the court, such inspection will promote the ends of justice, clearly recognizes the right of a jury to receive evidence by inspection If this is true with reference to places and premises, which cannot be incorporated in the record or introduced in evidence before the jury in the court room, why should it not be true as to any other object or thing which is introduced in evidence before the jury, under the direction of the trial court? If the jury can exercise the power of inspection through the sense of sight, why should they not exercise the power of inspection through any or all of their other senses? We hold that they have this power as to all objects and things introduced in evidence before them, subject to the discretion and control of the trial court, a proper understanding of which depends upon the common experience of men. In a matter requiring expert knowledge this would not be true.

We are fully sustained in these views by the following authorities:

After discussing the subject of inspection by the jury, or autoptic evidence, at length, Mr. Wigmore, in the second volume of his work on Evidence, in section 1152, says:

"In short, it does not appear that there is, in the nature of the process, any distinction to be taken as regards the kind of fact presented for inspection. Anything cognizable by the senses of the tribunal may thus be offered."

17 Cyc. p. 290, is as follows:

"The tribunal of fact receives evidence through three channels—inspection, documents, and witnesses. Evidence gained by inspection covers facts which the tribunal cognizes with its own senses; sees, hears, smells, tastes, or otherwise perceives for itself."

This question of the right of a party to introduce autoptic evidence, which is the same thing as inspection by the jury, came up in the case of *Gentry v. McGinnis,* 3 Dana (Ky.) 382, 386. This case involved the question as to whether the plaintiff was a white or negro woman. Chief Justice Robertson said:

"The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence * * * To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. * * * Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact. * * * (Jurors), when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. * * * Hence the policy of having a jury in the vicinage; and hence, too, jurors have not only been permitted, but required, to decide on autoptical examination wherever it was practical and convenient."

Wharton on Criminal Evidence (9th Ed.) § 312, is as follows:

"The remains of a deceased person may be produced, when in a fit condition, for the purpose of showing the nature of an injury. So all instruments by which an offense is alleged to have been committed; all clothes of parties concerned, from which inference may be drawn; all materials in any way part of the *res gestae* may be produced at the trial of the case. Injury to the person may also be proved by inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury while the surgeon who was employed to set it testifies as to the injury. When the issue is infancy, on an indictment, the court and jury may decide by inspection, and so when the question arises as to the color of a person. On an issue of bastardy, the jury may judge of likenesses by inspection; and so on an issue of adultery, for the purpose of connecting a child with a putative father."

In *Commonwealth v. Stevens,* 142 Mass. 457, 8 N. E. 344, the court said:

> "The small bottle of whiskey produced by the witness Pease was properly admitted in evidence; it being identified as the whiskey which he bought of the defendant."

In *State v. McCafferty,* 63 Me. 224, Justice Dickerson, in rendering the unanimous opinion of the court, said:

> "The leave granted to the jury by the court to take to their room a bottle of the liquor introduced in evidence, not as the liquor seized, but as liquor manufactured and sold by the same person under the same name as the liquor seized, was unobjectionable, coupled with the instruction to the jury not to consider the qualities of such liquor unless they should find from the evidence in the case that it was the same kind as that seized."

We think that the court went too far in permitting the jury to take to their room the bottle of liquor introduced in evidence, on account of the danger of abuse of the privilege. In the absence of a statute to the contrary, the jury should not be permitted to have any kind of beer or intoxicating liquor in their room.

In the case of *People v. Kinney,* 124 Mich. 486, 83 N. W. 147, the Supreme Court of Michigan held that:

> "After Mahoney had given his testimony, the prosecution offered the bottle of cider in evidence. Counsel for respondent objected to this offer on the ground that it was incompetent irrelevant, and immaterial. The court said: 'Unless the evidence in this case shows that the contents of this bottle is in the same condition it was on October 5th, it would be of no value as evidence; but, if the evidence has any tendency to show it in the same condition, it would be admissible.' It was received in evidence, and the court then said: 'There is a tumbler, gentlemen, if you want to taste of it—any of you.' Respondent's counsel objected to these remarks of the court instructing the jury that they might taste it. The argument of respondent's counsel here is that if the jury, by tasting it, smelling or drinking it, as they were ordered by the court, thereby acquired knowledge or formed opinions of its properties, as to whether it was hard or fermented cider, those

tasting or smelling it could not give evidence to their fellow jurors without being sworn. There is nothing in the record showing or tending to show that any of the jurors smelled or drank of it, nor is there any evidence that the bottle was placed in their hands for examination. The record is entirely silent upon that subject; but, even if it had been handed them and they had tasted it, we think it would not have been error."

In *Schulenberg v. State,* 112 N. W. 304, the Supreme Court of Nebraska said:

"The authorities are somewhat in conflict as to the propriety of permitting jurors to taste of liquor in prosecutions of this character, and the question has never before been in this court for determination. The Appellate Court of Kansas in *State v. Lindgrove,* 1 Kan. App. 51, 41 Pac. 689, held that it was error to permit jurors to taste of liquor produced in evidence. The reasoning seems to be that the jurors thus obtained private grounds of the belief, and that, after tasting of the liquor, they were properly witnesses in the case and disqualified as jurors. We are unable to concur in that reasoning. If a belief founded on the evidence during the progress of a trial can be held to be a private ground of information, then it may be so held because of a belief founded on any class of evidence. In *Commonwealth v. Brelsford,* 161 Mass. 61, 36 N. E. 677, it is said: 'There are grave reasons against giving liquor to a jury to drink for the purpose of determining whether or not it is intoxicating.' We entirely agree with the sentiment there expressed, where such course is taken by direction of the court, express or implied. The tasting should not be compulsory."

In the case of *Weinandt v. State,* (Neb.) 113 N. W. 1041, it is held that:

"While the court would have no authority to direct or compel the jury to taste or sample liquors, it was not error to permit them to taste thereof if they so chose."

When the trial court is of the opinion that the ends of justice will be advanced by permitting the jury to examine or inspect anything that has been introduced in evidence, the court may permit this to be done, but the examination or inspection must be in open court, and in the presence of the defendant, and at all times subject to the control of the court. Our statute, permitting an inspection by the jury of places or premises, when in the judgment of the court the ends of justice will be promoted thereby, is simply an extension of the power of inspection to places and premises which cannot be brought into court. Thus we see that our statute recognizes, indorses, and extends the power of inspection. There was no abuse of the power of the trial court in permitting the jury in this case to smell the contents of the bottle introduced in evidence.

Fifth. Defendant complains that the venue was not proven in this case. The indictment laid the venue in Payne county, territory of Oklahoma. The witness Pennington testified that the whiskey was purchased from the defendant in Glencoe, Okla., and that defendant was a clerk in the drug store of R. B. Bryan, which drug store was in Glencoe, Okla. C. E. Donart testified that he was deputy clerk of Payne county, and that the record did not show that R. B. Bryan had a license to retail malt, spirituous, or vinous liquors in Glencoe, Okla., on the 12th day of May, 1906. The courts of this state take judicial notice of the boundaries of the state and of counties in the state, and also of the geographical position and location of cities and towns within their jurisdiction. *Harvey v. Territory,* 11 Okla., 163, 65 Pac. 837. Under this rule the evidence in the case was sufficient to support the venue of the case.

Sixth. The defendant complains that there was no sufficient evidence that R. B. Bryan did not have a license to retail malt, spirituous, and vinous liquors. The deputy county clerk testified that the records of his office did not show that any such license had been granted to R. B. Bryan. We are at a loss to know how any better proof of a want of license to retail liquors could be made than was made in this case. Black on Intoxicating Liquors cites and discusses all of the authorities, and then, on page 507, sums up as follows:

"The rule established by the vast preponderance of authority is that, in cases where a license to sell, if produced and relied on, would constitute a complete defense to the action, the prosecution is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but, on the contrary, the defendant must assume the burden of proving that he was licensed. Various reasons have at different times been advanced in support of this rule. Thus, Dr. Bishop thinks that a *prima facie* case is made out for the prosecution, without evidence on this point, by the presumption that the defendant belongs to the general mass of people, who are unlicensed, rather than to the exceptional class of license holders, and that, as there was certainly a time when he was not licensed, the presumption of continuance applies, which presumptions the rule requires him to overcome by proof. But we believe the rule is sufficiently justified by considerations of convenience and reasonableness. It is a general and well-settled principle that: 'Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, or the like. Here the party, if licensed, can immediately show it without the least inconvenience, whereas, if proof of the negative were required, the inconvenience would be very great.' Another view advanced by the court in Georgia is that a plea of 'not guilty' to a charge of selling without license amounts to an allegation of selling with license, and the rule applies that he who alleges affirmative must prove it, especially if it is peculiarly within his knowledge."

Finding that no material error was committed on the trial of this case, the judgment is in all things affirmed.

BAKER and DOYLE, JUDGES, concur.

S. C. CAVETT V. TERRITORY.

No. 1983, Okla. T. Opinion Filed December 23, 1908.

(98 Pac. 890.)

1. **GRAND JURY—Summoning Talesmen—Common Law.** It was not error, at the time this case was tried in the court below, to summon a grand jury by means of an open venire issued to the United States marshal of the county to summon a grand jury from the body of the county, when the names were exhausted from the regular jury box of the county.

2. **SAME.** The district courts of the territory of Oklahoma possessed common-law jurisdiction, and had the power to invoke the common-

law method of summoning grand juries, when the list of names selected as jurors for the county were exhausted, and the jury box was empty.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; B. F. Burwell, Judge.

S. C. Cavett was convicted of manslaughter in the second degree, and he brings error. Affirmed.

The accused was by the grand jury of Pottawatomie county, Okla., at the September, 1904, term of the district court of said county, indicted for the crime of murder. Upon being arraigned, he asked for and was given time in which to plead to said indictment. On the 4th day of October, 1904, he filed in said court a general demurrer to the sufficiency of the indictment. This demurrer was overruled, to which ruling the accused duly excepted, and on the same day filed in said court his motion to quash and set aside the indictment for the following reasons:

"First. Because said indictment was not found, indorsed, presented, and filed as prescribed by the statutes in such case made and provided. Second. Because the grand jury which found and presented said indictment was not drawn and impaneled as provided by law."

The motion to quash and set aside the indictment was heard upon a statement of facts, agreed to by counsel for both the accused and the territory, which agreement is in the words following, to-wit:

"It is hereby agreed by the attorneys for the territory and the defendant, S. C. Cavett, on trial for murder, on the hearing of the motion of the defendant to set aside the indictment, that the court may decide this motion upon the following statement of facts: That the grand jury that returned the indictment in this case was summoned by the deputy marshal on an open venire, the names of the jurors, at the date of the summoning of this jury, having been exhausted from the jury box; that among the names of jurors returned by said deputy marshal was the name of J. R. Pring, who was excused from jury service—from sitting on the jury—by the court, without assigning any reason therefor, which was placed upon the record."

There apperas in the record, following said stipulation, this statement by the court below:

"I will state to counsel that, in the event the record is made out in this case, the court will formulate a statement, and give the reasons why this juror was excused."

Said last-named motion was also overruled, to which ruling the accused duly excepted, and thereupon entered his plea of not guilty.

Thereafter, on the 5th day of July, 1905, put upon his trial upon said indictment, the accused was convicted of the crime of manslaughter in the second degree, and in due time filed his motion to set aside the verdict and grant him a new trial, for the following reasons: (1) Because the verdict was contrary to the evidence; (2) because the verdict was contrary to the law; (3) because the court misdirected the jury in matters of law occurring during the trial; and (4) because the court erred in the decision of questions of law arising during the course of the trial. Said motion was overruled, to which ruling the accused duly excepted, and filed his further motion to set aside the verdict against him and arrest the judgment therein, for the reason:

"The grand jury which found and presented said indictment was not constituted in manner required by law, and was illegally constituted and without authority or jurisdiction to find and present said indictment."

Both of said motions being overruled, to which rulings the accused duly excepted. Thereupon the court, entering judgment upon said verdict, sentenced the accused to be imprisoned in the territorial penitentiary at Lansing, state of Kansas for a term of three years.

Roy Hoffman, J. B. A. Robertson, and *S. A. Cordell*, for plaintiff in error.—

On question of legality of grand jury: Statutes of Oklahoma 1893, Secs. 3093—3095, 3098, 3100—3102, 5025-5033, 5036, 5037, 5045; Session Laws 1895, c. 41, art. 1, secs. 13-15, 19, 20; *Sharpe v. U. S.* 138 Fed. 881; *Ex parte Farley*, 40 Fed. 66; *Clinton v. Engelbrecht*, 13 Wall. 424; *Clough v. Curtis*, 134 U. S. 361.

Charles West, Atty Gen., and *W. C. Reeves*, Asst. Atty. Gen., for the Territory.—

On question of legality of grand jury: Wilson's Rev. & Ann. St., secs. 4200, 5151; *Goodson v. U. S.*, 7 Okla. 117; *Moran v. Territory*, 14 Okla. 544.

On question of sufficiency of indictment: *Walcher v. Territory*, 18 Okla. 528.

BAKER, JUDGE (after stating the facts as above). Complete and instructive briefs were filed on both sides in this case. The accused urges the following assignments of error: First, the court erred in overruling motion for new trial; second, in overruling motion in arrest of judgment; third, in giving erroneous and misleading instructions to the jury; fourth, in overruling demurrer to the indictment; fifth, in not sustaining the motion to quash and set aside the indictment; sixth, in admitting evidence on the part of the territory which is incompetent, irrelevant, immaterial, and prejudicial to the rights and interests of the accused; seventh, in refusing and ruling out competent legal evidence offered by the accused; eighth, in misdirecting the jury on questions of law; and, ninth, in ruling on questions of evidence at the trial—all of which errors were excepted to by the accused at the time.

Taking up the assignments of error stated in the brief of the accused, we are confronted, first, with the proposition: Was the grand jury that found the indictment against the accused legally constituted and impaneled? It is urged by the accused that it was error for the court to direct a deputy sheriff, by means of an open venire, to summon a grand jury for said court from the body of the county, notwithstanding the names constituting the regularly selected jurors to act as grand and petit jurors for said county for said term had become exhausted, and the jury box of said county was empty, and urge with much apparent confidence that said grand jury should have been selected in all respects as required by the then existing jury statutes of the territory of Oklahoma, and that any deviation from said statutes in the manner of selecting a grand jury would be prejudicial error and entitle the accused to a new trial. We have carefully read all the statutes cited by the accused, as well as sections 4200 and 5151, Wilson's Rev. & Ann. St. Okla. 1903, which provide:

"Section 4200. The common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma. * * *"

"Sec. 5151. The procedure, practice and pleadings in the district courts of this territory, in criminal nature, not specifically provided for in this chapter, shall be in accordance with the procedure, practice and pleadings of the common law, and assimilated as near as may be with the procedure, practice and pleadings of the United States or federal side of said court."

The record in this case shows that, when the district court of Pottawatomie county reached the case at bar, the names of jurors provided under the various statutes of said territory had become exhausted, and the jury box of said county was empty. It is urged by the accused that the statutes pertaining to the selection of names for jurors of said county should have been enforced. In the light of section 4200, above quoted, and the decisions of the Supreme Court of the territory of Oklahoma, and the authorities hereinafter cited, this court thinks it was unnecessary to do so, and that the common-law method of selecting a jury could legally be resorted to, and that it was not error in this case to summon the grand jury by means of an open venire from the body of the county, that the grand jury in this case was in all respects a legal one, and the rights and interests of the accused in no way injuriously or prejudicially affected.

The Supreme Court of Oklahoma Territory, in the case of *Goodson v. United States,* 7 Okla. 146, 54 Pac. 423, 432, held:

"Our district courts are courts of common-law jurisdiction, and under the foregoing statutorv provisions (sections 4200 and 5151, Wilson's Rev. & Ann. St. 1903) may resort to the common law in any matter of practice where the statutory method of procedure is inapplicable, or in any case where specific provision is not made for the practice by the statutes."

The above rule has been followed and approved by the court in the following later case: *Smith et al. v. Territory of Oklahoma,* 14 Okla. 518, 79 Pac. 214. In this case the court say:

"The district courts of Oklahoma possess common-law jurisdiction, and these courts have the power and authority to invoke the common-law method of summoning a grand jury when no other provision is made by the statute, or when the provision so made is inadequate."

It is ably contended by counsel for the accused that the district courts of the territory of Oklahoma are the creatures of statute, and have no jurisdiction except that which is specifically granted them by the statute, and that said court could do no legal act except in compliance with the statutes. This is not the view taken by the Supreme Court of the territory of Oklahoma, nor is it so held by the Supreme Court of the United States. We find a very well-considered and ably decided case practically on "all-fours" with the case at bar in *Clawson v. United States,* 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179 (a Utah case). The examination of this case discloses the fact that under section 4 of the act of Congress dated June 23, 1874 (chapter 469, 18 Stat. 254), which relates to courts and judicial officers in the territory of Utah, which statute provides for the selection of a jury, is very much like the provisions of the statutes in force in Oklahoma Territory at the time this case was tried below. The court in this case held, on the trial of an indictment, the names in the jury box of 200 jurors, provided for by said act, being exhausted when the jury to try this case was being impaneled, that the district court legally issued an open venire to the United States marshal of the territory, to summon jurors from the body of the judicial district, and the jury was composed of persons thus summoned. The syllabus of the case reads:

"In the trial of an indictment, if the names in the jury box of 200 jurors provided for by statutes are exhausted when the jury is only partly impaneled, the district court may issue a venire to the United States marshal for the territory to summon jurors from the body of the judicial district, and the jury may be completed from persons thus summoned."

Mr. Justice Blatchford, speaking for the court, says:

"It is assigned for error that the petit jury was illegally constituted, in that the court had no right to summon petit jurors on an open venire. The argument is: That the provisions of section 4 of the act of June 23, 1874, are, on their face, exclusive; that the method prescribed by that section for obtaining jurors is the only one that can be employed; that only the probate judge and the clerk of the court can select the jurors and make the jury list; that the grand and petit jurors for a term must be drawn by the marshal from a box containing names of persons thus selected, and constitute the regular grand and petit juries for the term; that if, during the term, any additional grand or petit jurors are necessary, they must be drawn by the marshal in open court from the same box; and that if the 200 names are all drawn out, for grand or petit jurors, at any time during the year, there can be no more indictments found or any more civil or criminal jury trials had in the court of the district for the rest of the year because it is provided in section 4 that the jurors drawn from the box shall be jurors only for the term, of which there are four in the year; and that the names drawn shall not be again placed in the box until a new jury list is made, which is to be done annually in January."

Further commenting in the opinion, the learned justice says:

"But the act does not directly or by implication or intendment exclude the use of an open venire when the 200 names are exhausted during the year. * * * There is no doubt that jurors must be drawn from the 200 names, or those of them remaining in the box, so long as any remain; but the question is: What is to be done when these names are exhausted, if there is no method that can be resorted to to obtain jurors?"

See 1 Chit. Crim. Law, 518; 2 Hale, P. C. 265, 266; *United States v. Hill,* 1 Brock. 156, Fed. Cas. No. 15,364; *Mackey v. People,* 2 Colo. 13; *Stone v. People,* 2 Scam. (Ill.) 326; *Straughan v. State,* 16 Ark. 36-43; *Wilburn v. State,* 21 Ark. 198, 201; *Gibson v. Com.,* 2 Va. Cases. 111-121; *Shaffer v. State,* 1 How. (Miss.) 238; *Woodsides v. State,* 2 How. (Miss.) 655; *State v. Harris* (Supreme Court of Iowa September, 1884) 17 Chi. Leg. N. 58.

It is a well-recognized legal principle that a venire to summon jurors is a writ necessary to the exercise of the jurisdiction of the court and agreeable to the usages of law. Therefore where it is not forbidden or excluded, and where the affirmative provisions of the law have, so far as they extend, been first observed, the open venire will in such case issue. The doctrine just stated is upheld and approved in the case of *Moran v. Territory of Oklahoma*, 14 Okla. 544, 78 Pac. 111.

The able counsel for the accused rely strongly upon the case of *Sharp v. United States,* 138 Fed. 881, 71 C. C. A. 258. This court is unable to agree with counsel for the accused that this case is in any manner analogous with the case at bar, for the very apparent reason that the decision in the *Sharp Case* was based entirely upon irregularity in drawing and impaneling the jury, which was undertaken to be done under the provisions of Wilson's Rev. & Ann. St. 1903, c. 46. In the *Sharp Case,* the list selected as provided by said chapter had not become exhausted, while, in the case at bar, the names of the jurors returned by the selection board, as provided by said statute, had been exhausted, and the box was empty, and the court impaneled the jury in the case at bar under the common law, by means of the open venire complained of by the accused. We think that, under the circumstances prevailing in the case at bar, there was nothing in the record to show that the substantial rights of the accused were in any manner affected by summoning on the jury that indicted the accused persons disqualified for any cause. No such claim is made, and the record shows that all the jurors were men well qualified to act as grand jurors. The accused was in no manner injured in his substantial rights.

The accused complains that the court below erred in releasing from grand jury service one J. R. Pring, who had been summoned to serve as a grand juror, at the term of the court at which the indictment against the accused in the case at bar was returned, and he bases his complaint entirely upon the proposition that the court, in releasing said juror from such service, did not enter his reasons of record. Not that if the reason had been entered, that it would disclose an improper or unlawful reason but simply urges that the court erred because some reason was not entered of record. The record shows that the trial court did not enter of record at the time of the discharge of said juror from service, his reason for such discharge, but entered in the record the following statement: "If desired by the accused I will formulate a statement and give the reasons why the juror (referring to Pring) was excused." This court presumes that, inasmuch as the court below offered to enter its reason for the release of said juror of record, if the accused desired, and the accused not having requested the court to enter such reason of record, the reason for the discharge of said juror was in fact good and legal, and not prejudicial to the rights of the accused, and if the court's reasons for such discharge were in fact illegal, insufficient, and prejudicial to the accused, he would have had such alleged reasons appear of record in order that this court would thereby be fully advised of the error of said court, and the rights of the accused fully protected. The accused has waived any right he may have had growing out of the action of the court below in releasing said juror, by not requesting the court below to enter or record the reasons, if any, for such release. The rights of the accused therefore have not been abridged or prejudiced in the release of said juror.

The accused also urges that the court committed error in overruling both the demurrer to the indictment herein and the motion to quash and set aside the indictment. The reasons assigned by the accused in both the demurrer and the motion being practically the same and raising the same questions of law, we will consider them together. The accused urges, in his demurrer, in substance that the indictment does not substantially conform with the requirements of article 7, c. 68, Cr. Proc. (Wilson's Rev. & Ann. St. Okla. 1903, §§ 5349-5378), that more than one offense is charged in the indictment, that the facts in the indictment do not constitute a public offense, and that the indictment does not set out the offense attempted to be charged in such plain language as it would enable a person of common understanding to know what is to be meant. This brings us to a consideration of the statute defining the crime of murder. Section 2167, Wilson's Rev. & Ann. St. Okla. 1903, defines homicide as follows:

"When a person without authority of law and with a premeditated design to effect the death of the person killed, or any other human being."

The statute just quoted gives a plain and correct definition of murder. Therefore, if the homicide complained of is a result of a premeditated design to effect the death of the person killed, and is without authority of the law, it is murder, and can be alleged and described in plain ordinary words. It is self-evident, from the reading of the indictment in this case, that it contains about all the unnecessary and redundant verbiage that a lawyer, skilled as a pleader, is capable of incorporating into a charge without actually invalidating it. We do not, by any means, commend this indictment, and sincerely hope that it will not be followed. It is not an exhibition of good pleading by any means, but, nevertheless, we think it charges fully the crime of murder, as defined by the statute, and, when shorn of the unnecessary words in it contained, it alleges, substantially, that S. C. Cavett, late of Pottawatomie county, Okla., willfully, purposely, and feloniously, and of his deliberate and premeditated malice, and without authority of law, and with a premeditated design to effect the death of one Gilliland, did make an assault upon the body of him, the said J. A. Gilliland, with intent him, the said J. A. Gilliland, willfully, unlawfully, and feloniously, and purposely, and of his deliberate and premeditated malice to kill and murder, and that he did kill said J. A. Gilliland. If the above averments can be fairly gathered from the statements embraced in the indictment, then, in the opinion of this court, it sufficiently charges the crime of murder.

The sufficiency of this indictment seems to be well settled in an able opinion rendered by Chief Justice Burford in the case of *James Walcher v. Territory of Oklahoma,* found in 18 Okla., at page 528, 90 Pac., at page 887, in which the court said:

"The facts necessary to be alleged are: First, that James Walcher shot and killed John F. Stone in Kingfisher county, Okla.; second, that he shot him with a loaded gun; third, that he discharged the gun at the deceased with a premeditated design to take his life. If these three material everments can be gathered from the profuse and confused averments embraced in the indictment, then it sufficiently charges the crime of murder. * * *"

It cannot be successfully claimed in this case that the indictment omitted any one of the three necessary ingredients or averments. The indictment in this case can well be analyzed, in plain, modern, common-sense English, to mean this: That on the 13th day of August, 1904, in Pottawatomie county, Oklahoma Territory, S. C. Cavett made an assault upon J. A. Gilliland with the intent to kill and murder him; that said S. C. Cavett then and there unlawfully, purposely, and of his deliberate and premeditated malice with intent to kill J. A. Gilliland, with a certain knife, cut, stabbed, and mortally wounded said J. A. Gilliland then and there giving said J. A. Gilliland with intent aforesaid, two mortal wounds, from which the said J. A. Gilliland died. This court is therefore of the opinion, and so holds, that said indictment charges the crime of murder. This court also finds that the indictment in this case was properly found, indorsed, presented, and filed as prescribed by law and that but one offense is therein charged.

The next error complained of is that the court erred in permitting counsel for the prosecution to indorse the list of names of witnesses on the indictment after such counsel had made his statement to the jury, and after such jury had been sworn to try the case. From an examination of the record it appears that some 60 or more names of persons who had been examined before the grand jury, were indorsed on the indictment, and it nowhere appears in the record what names, if any, were added to said list after the trial of this case had been commenced, and the record is absolutely silent as to how the accused was or could have been prejudiced in his substantial and material rights in the indorsement of such names, and we have not been able to find any well-considered authority that holds that, in the absence of a showing in the record, the accused was prejudiced by the indorsement of such names, or that the mere adding and indorsing additional names on the indictment was prejudicial error.

This brings us to the fifth assignment of error, which is directed against the two instructions of the court, namely, charge No. 19 and charge No. 20. They are as follows:

"Instruction No. 19. Evidence had been introduced by the defendant for the purpose of showing that the deceased, just prior to the difficulty, and after the difficulty, on the street by the bank, was looking for the defendant in different places of business in the town of McLoud; and in this connection, if you find that he was looking for the defendant for the purpose of having a difficulty with him, even this would not justify the defendant striking the deceased with the knife, unless, at or just prior to such time, the deceased made demonstration such as would reasonably cause the defendant to believe that the deceased was about to shoot him or to do him bodily harm, and that it reasonably appeared necessary to the defendant to strike in defense of his own person.

"Instruction No 20. You are further instructed that one is not justified in assaulting another through mere fear, cowardice, or malice, but the law requires that he act with reasonable courage, taking into consideration his age, experience, temperament, and all other matters disclosed upon trial, tending to show as to whether or not, situated as the defendant was, and viewing the transaction from his standpoint and with his knowledge and information, he had reasonable ground for fear of bodily harm. Before one is justified in assaulting another, he must reasonably believe that he is in danger of receiving bodily harm at the hands of his adversary."

The court finds, after carefully reading all the evidence disclosed by the record, which is very voluminous, and in many instances contains much cumulative evidence and many repetitions, the evidence with reference to the facts showing the conduct of the parties on the day of the homicide, and the occurrences of that day, and a short time prior to, and at the time of the tragedy, are substantially undisputed except in a few minor details. It is clearly shown by the evidence that the accused and the deceased were brothers-in-law, and some years prior to the killing had many quarrels and misunderstandings, which in each instance, it appears from the evidence, were forgiven on both sides and good will between the parties always restored. The testimony also shows that the deceased made many threats against the accused; but that they had not been taken seriously by the accused is shown by his testimony,.in which he says, in answer to questions, as shown on page 309 of the record:

"How long was it after you had your trouble somewhere about four years ago until your friendly relations were established again? Answer. Why, right away—just a day or so. Q. Then did you and he continue on speaking terms and friendly so far as you know up to the time of this trouble? A. Yes, sir."

It is apparent from the evidence that the threats made by tnc deceased could have made but little impression upon the mind of the accused, and engendered but little fear in his breast, and it is clearly shown that, on the day of the killing, the accused met the deceased upon one of the main business corners of the principal business streets of the town of McLoud The accused, being armed with a knife (and apparently the same knife that afterwards inflicted the mortal wound upon the deceased), assaulted the deceased by making demonstrations with his knife toward the deceased. The accused and the deceased, upon parting, threatened one another The accused, if not actually looking for trouble with the deceased, was taking no steps whatever to prevent it. After the meeting at the bank corner of the day of the killing, and a short time before the tragedy, the accused went to the saloon of his brother, Bud Cavett, in said town, and the deceased went to a hardware store and purchased a pistol, and then went to the front of the saloon where the accused had gone. The accused was inside of the saloon in a back room when the deceased reached the front door of the saloon. In the saloon with the accused was his brother and little son. At the particular moment that the deceased reached the front door of the saloon, the town marshall of McLoud stood in the front door. For the deceased and the accused to get together at that particular time, it was necessary for either one or the other to pass the city marshal. The accused, being armed with a knife, instead of seeking to prevent a personal encounter with the deceased, who was then armed with a pistol (which the accused says he knew), rushed out of the front door into danger, passing the marshal on his way to his victim, struck the deceased on the top of the head with some hard instrument, the blow causing the deceased to immediately drop his pistol and fall on "all fours" to the sidewalk, after which the accused immediately inflicted the mortal wounds.

The jury, from the testimony, were justified in believing that the accused was looking for trouble, was the aggressor, as he had been on the street before, instead of avoiding trouble and possibly the necessity for taking life, by going out of the back door of the saloon, and thus avoiding the deceased, and taking steps to protect himself from the violent action of the deceased by having him put under a peace bond, and giving him time for his mind to cool and restore friendship, which had, according to the testimony, been often done before. The court is therefore of the opinion that the court below properly instructed the jury, predicated upon the testimony shown by the record, and that the jury was fully authorized in rendering a verdict of manslaughter in this case, and that the whole charge, including the two instructions complained of, was in all respects a fair, proper, and legal charge in the light of the evidence, and was not prejudicial, and in all respects properly safeguarded the legal rights of the accused. Reading the whole charge carefully, and then reading the two instructions complained of in connection therewith, we are unable to find how it was possible that the instructions complained of could be prejudicial to the rights of the accused.

We fail to find that the court erred in admitting or rejecting evidence offered on either side in this case, and finding that the accused had in all respects a fair and impartial trial, and finding no prejudicial error in the record, we affirm the judgment of the court below at the costs of the accused, and direct the sheriff of Pottawatomie county, Okla., to carry the judgment of the lower court into effect immediately.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

ON MOTION FOR REHEARING.

PER CURIAM. The plaintiff in error filed his motion for rehearing herein, in which he contends: That the judgment of the district court in this case is wrong, and that the decision ot the court affirming the same is therefore wrong, and both should be reversed, for the reason that the judgment of this court delivered December 23d last, is contrary to the law, and is not sustained by the law. That said decision was rendered under a misapprehension of the law.

The petition for rehearing sets forth a lengthy discussion of the authorities relied upon by the plaintiff in error, and lays special stress upon the claim that the grand jury in the case at bar was impaneled contrary to law and in contravention of the doctrine laid down by the United Circuit Court of Appeals in the case of *Sharpe v. United States,* 138 Fed. 881, 71 C. C. 258. That this court disregarded in its decision of this case that portion of section 4200 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, which reads as follows:

> "But the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

Counsel for the accused urge at length, in the petition for rehearing, that this court, in considering the case of *Clawson v. United States,* 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179, overlooked the distinction between that case and the case at bar, insomuch as in the *Clawson Case* the jury complained of was a petit jury, and in this case the jury complained of was a grand jury. The accused also contends that this court gave consideration to cases that were decided by the courts of the territory of Oklahoma prior to June 12, 1905, the date of the decision of the *Sharpe Case, supra.* Counsel for the accused in the petition for rehearing raise no new questions, nor do they cite any additional authorities. All the questions raised by the petition for rehearing were urged in the brief of the accused filed in support of the petition in error, and were fully and carefully considered by this court.

This court, after again fully considering this case and all the authorities cited by the able counsel for the accused, and carefully considering the allegations of the petition for rehearing, and the authorities therein cited, is still of the opinion that there was no prejudicial error in the record, and that all the material rights of the accused have been fully respected and protected, and that the decision of this court handed down on the 23d of December, 1908, is just and proper, and therefore the petition for rehearing should be, and the same is, hereby overruled.

J. P. PRICE v. TERRITORY.

No. 2117. Okla. T. Opinion Filed January 11, 1909.

(99 Pac. 157.)

1. **INSTRUCTIONS—Appeal—Waiver of Objections.** In a criminal case (other than a capital case), in the absence of any request by the accused for specific instruction, it will be held that the accused was satisfied with the instructions as given.

2. **SAME.** When the accused complains that the trial court erroneously instructed the jury, but such instructions were not excepted to by him at the time and the exceptions properly saved in the record, such error, unless of a fundamental character, will be treated as waived by the accused, and exceptions to such instructions will not be considered for the first time in this court.

3. **CRIMINAL LAW—Appeal—Review—Rulings on Evidence.** In all cases except capital offenses, this court will not review the action of the trial court in admitting or rejecting evidence over the objection and exception of the accused, unless such objection and exception appear of record in the proceedings of the trial court.

4. **GRAND JURY—Challenge to Panel—Selection During Term.** It is not error for the trial court to overrule a challenge to the entire panel of the grand jury because the grand jury was selected after the commencement of the term of the district court at which the indictment complained of was returned, instead of before the commencement of such term, as provided by an act of Congress approved February 9, 1906 (Act Feb. 9, 1906, c. 155, 34 Stat. 11), entitled "an act to provide for the selection of grand and petit jurors for the district courts in the territory of Oklahoma"; the provisions of said act as to the time of the selection of the grand jury being directory only.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; B. F. Burwell, Judge.

J. P. Price was convicted of shooting with intent to kill, and brings error. Affirmed.

On the 17th day of March, 1906, the grand jury of Pottawatomie county, Okla., returned an indictment against the accused, J. P. Price, charging him with the crime of shooting with intent to kill. On the 22d day of March, of the same year, the defendant was arraigned, and entered a plea of not guilty to said indictment, and on said last-named date the cause was set for trial on the 26th day of March, 1906, and was then continued to

March 27, 1906. On March 27, 1906, the cause was tried in said court, and resulted in a verdict of guilty as charged in the indictment. The accused in due time filed his motion for a new trial, which was by the court overruled, to which the accused duly excepted; and thereupon the accused was sentenced to serve a term of 18 months in the territorial penitentiary. Time was given the accused to make and serve a case-made on appeal to the Supreme Court. A challenge to the panel of the grand jury was interposed by the accused, and was submitted to the court below on an alleged agreed statement of facts in open court, and overruled, to which ruling the accused excepted. Briefs are filed by both sides.

L. G. Pitman, for plaintiff in error.—On question of challenge to panel of grand jury: Act of Congress Feb. 9, 1906, c. 155, 34 Stat. 11; *Sharp v. U. S.,* 138 Fed. 878.

W. C. Reeves, Asst. Atty. Gen., for the Territory.—On same question: Sutherland's Statutory construction, § 612, p. 1117; *Marion v. Territory ex rel.,* 1 Okla. 210; *Kenedy v. Oregon Short Line R. Co.,* 18 *Utah,* 325; *Merchant v. Langworthy,* 6 Hill (N. Y.) 646; *Pond v. Negus,* 3 Mass. 230; *People v. Allen,* 6 Wend. 486; *Reeves v. State,* 29 Fla., 529; *Burlingame v. Burlingame,* 18 Wis. 300; *Thomas v. People,* 39 Mich, 311; *State v. Smith,* 67 Me. 332; *People v. Wallace,* 101 Cal. 281; *Missouri v. Pitts,* 58 Mo. 556; *Colt v. Ives,* 12 Conn. 243.

BAKER, JUDGE (after stating the facts as above). The petition in error in this case complains of the following errors:

(1) The court erred in overruling the motion of accused for a new trial.

(2) The court erred in overruling the motion of the accused in arrest of judgment.

(3) The court erred in giving erroneous and misleading instructions to the jury which were duly excepted to by the accused.

(4) The court erred in overruling the demurrer to the indictment.

(5) The court erred in not sustaining the motion of accused to set aside the indictment upon which the accused was tried.

(6) The court erred in admitting evidence on the part of the territory which was incompetent and irrelevant and prejudicial to the rights of the accused.

(7) The court erred in refusing and ruling out competent and legal evidence offered by the accused.

(8) The court erred in misdirecting the jury on questions of law.

(9) The court erred in ruling on questions of evidence at the time of the trial.

(10) The court erred in overruling the challenge to the entire panel of the grand jury.

Taking the errors assigned in order made in the brief of the accused, we have first the error complained of arising upon the alleged challenge to the panel of the grand jury, and the overruling thereof by the court below. A carful examination of the record fails to disclose such challenge in the case at bar. The record at page 10 shows that one of the counsel of the accused in behalf of nine prisoners then in custody, or under recognizance in Pottawatomie county, charged with crime, who were all specifically named in a challenge to the panel of the grand jury; but the name of the accused in this case is not included, and therefore, so far as the court below is concerned, no challenge was then made by the accused in this case, and no exception is saved in favor of the accused, and no benefit therefrom can accrue to the accused, unless the challenge to the panel of the grand jury, as made in this record, raises a jurisdictional question, and as such the accused could legally raise such question for the first time in this court, resolving all the doubt as to the correctness of such practice in favor of the accused, and giving him the full benefit of the record, and the possible legal advantages that the accused might gain therefrom. We will, for the purpose of this case, consider that the accused makes his challenge to the panel of the grand jury, based upon the facts as disclosed by the agreed statement of facts found on page 10 of the record, in which it is admitted that the grand jury, for the term of the district court in said county, at the time the accused was tried, was not selected before said term of court commenced, as required by the act of Congress approved February 9, 1906, entitled "An act to provide for the selection of grand and pettit jurors for the district courts of the territory of Oklahoma." Act Feb. 9, 1906, c 155, 34 Stat. 11.

It is admitted by counsel for the accused that the provisions of said act were all properly complied with except as to time; that all the things necessary to be done under and by the terms and provisions of said act were in fact done, but that said things were done after the term of court at which the indictment was returned against the accused, instead of before such term commenced, as provided by said act. The accused urges that the provisions of the act in question, as to the time the steps should be taken and things should be done in selecting and impaneling the grand jury, are mandatory, and that a violation thereof is prejudicial error, and entitles him to a new trial. If said provision is mandatory, then the accused should be given a new trial. We have carefully read all the authorities cited on both sides, and such additional authorities as we were able to find after a careful search. The best and most convincing authorities upon this proposition hold said provision directory only.

We call counsel's attention to the following authorities:

Sutherland's Statutory Construction, § 612, p. 1117, reads:

"Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of power of the officer.

* * * The time of summoning jurors, except so far as their own convenience is concerned, is quite an immaterial thing, which could in no wise affect their official acts. And so of other departures from the letter of statutes relating to obtaining jurors"—And numerous cases cited by this author.

In the case of the *State of Missouri, Respondent, v. Thomas Pitts,* found in 58 Mo. 556, the accused sought to take advantage of an irregularity in the impaneling of the jury, contending that under Sess. Laws 1873, p. 46, the county court is required to summon the regular panel of jurors 30 days before the term of the circuit court, and that the jury which found him guilty was not in fact summoned 30 days prior to the term of the court at which he was convicted, and urged that, by reason of such irregularity, he had not had an impartial trial, and that there was prejudicial error in the court not sustaining his motion to have the jury impaneled from the regular panel of jurors. Judge Sherwood, delivering the opinion of the court in said case, says:

> "There was no error in overruling the motion of defendant to have the jury impaneled from the regular panel of jurors. * * * And it was a matter of no moment that the regular panel for the term was not selected by the county court at least 30 days prior to the commencement of the term at which the prisoner was tried in accordance with the above mentioned act. That act can only be regarded as merely directory. To rule that it is mandatory would be to hold that, if by any accident the county court should not meet and select jurors in the time and manner provided by the act, the wheels of justice would have to stand still, and the circuit court be prevented from transacting its duties respecting crimes and criminals simply because the county court failed to discharge its duty. No such ruling will be made."

In the case of *State v. Smith,* 67 Me. 328 (a murder case), we find that in the state of Maine at the time of the trial of said case the provisions of Rev. St. 1871, tit. 9, c. 106, § 8, required that the venire for grand jurors to serve at the Supreme Judicial Court should be issued 40 days at least, before the second Monday in September, annually. The accused in this case sought to take advantage of the fact that the jury had not been so selected, and raised the question of the sufficiency and regularity of the grand jury by whom the indictment was found; and on the first day of the term interposed a challenge to the array, and, after the indictment was found and returned into court, he presented a plea in abatement, which was demurred to, and the demurrer sustained; the court holding that the provision regarding the time for the selecting of the jury was merely directory and not mandatory, and supporting the case of *Pond v. Negus,* 3 Mass. 230, 3 Am. Dec . 131, and *People v. Allen,* 6 Wend. (N. Y.) 486, which we hereafter cite.

In *People v. Allen,* 6 Wend. (N. Y.) 486, the court, by Judge Marcy, says:

"The statute, specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely unless the nature of the act to be performed or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer; and it was accordingly held that a brigade order constituting a court martial issued in July, when, by the militia law under which the proceeding was held, it was made the duty of the commandant of the brigade to issue such order on or before the first day of June in every year, was valid."

In the case of *Reeves v. State of Florida,* 29 Fla. 527, 10 South. 901, the statute of Florida (section 1, c. 3125, p. 65, Laws 1879) was discussed. The state of Florida at the time of the trial of the above-entitled case had a statute known as above stated, providing a time for the board of county commissioners to select from the registered voters of their respective counties a jury list of persons properly qualified to serve as jurors. Judge Mabry, in handing down the opinion of the court in said case, says that said statute was merely directory, and a failure to comply therewith was not prejudicial to the rights of the defendant, and held the panel to be in all respects regular.

The same doctrine is laid down in the case of *Margurite Kennedy et al., Respondents v. Oregon Short Line Railway Co.,* 18 Utah, 325, 54 Pac. 988, and cases therein cited. This case also approves *People v. Allen, supra,* and *Missouri v. Pitts,* *supra,* and cites many well considered cases in support of its decision.

The same doctrine is held in the case of *Colt v. Eves,* 12 Conn. 243, and *Thomas v. People,* 39 Mich. 311.

A very strong case is found in *Johnson v. State of Mississippi,* 33 Miss. 363, in which the court holds:

"That provision of the local act of 1854 (Laws 1854, p. 468, c. 341), made general in 1856, which enacts that grand jurors 'shall be summoned at least five days before the first day of the court' at which their attendance is required, is merely directory to the sheriff, and for the convenience of the jurors, and not essential to be observed in order to constitute a legal grand jury."

In the case of *Huntley v. Territory of Oklahoma,* 7 Okla. 60, 54 Pac. 314, our own Supreme Court has well held:

"In general the provisions of a statute in regard to the mode of obtaining juries are directory, and a substantial compliance with the requirements of the law is sufficient. The Supreme Court will not reverse the ruling of a district court overruling a challenge to the array upon objections to the manner in which the list of persons from which the panel was selected was made up when such objections are purely technical, and do not affect the substantial rights of the parties."

Thompson on Trials, c. 2; *Burlingame v. Burlingame,* 18 Wis. 300; *Merchant v Langworthy,* 6 Hill (N. Y.) 646.

The accused in support of his contention cites the case of *Sharp v. United States,* 138 Fed. 878, 71 C. C. A. 258, and relies thereon. We do not think the *Sharp Case* is analogous to the case at bar, for the reason that the decision in said case is based upon irregularities growing out of the drawing and impaneling of the jury under the provisions of Wilson's Rev. & Ann. St. 1903. c. 46. This court decided this question in the case of *S. C. Cavett v. Territory of Oklahoma* (at the last term of the court) *ante,* p. 493, 98 Pac. 890.

The challenge of the accused to the entire panel is not well taken, for the further reason that it nowhere appears in the record that any material or substantial right of the accused was affected. No claim is made that any person was selected and served on said grand jury who was not in all respects competent and qualified to serve as a grand juror.

Section 482, Code Cr. Proc. (section 5618, Wilson's Rev. & Ann. St. 1903), reads as follows:

"(5618) Sec. 482. On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

In view of this section, although we might be of the opinion that there was technical error in the action of the trial court in overruling the challenge to the entire panel of the grand jury, yet, unless we find and could say that the substantial rights of the accused were injuriously affected, we should not disturb the verdict. The court did not err in overruling the challenge to the panel.

The second proposition relied on by the accused for a new trial is the alleged insufficiency of the evidence. Notwithstanding the accused failed to properly preserve this question in the record, we have read every word of the testimony, and find it clearly and fully sustains the verdict.

Coming now to the last error complained of in the brief of the accused, which is directed to that part of the charge of the court which reads as follows: "And in this connection you are instructed that if you find by the degree of evidence stated in this instruction that the defendant unlawfully, willfully, and feloniously shot at the said Annie Price with the intent to kill her, as set forth and charged in the indictment, then it will be your duty to find the defendant guilty. Should you entertain a reasonable doubt of this charge, you should return a verdict of not guilty"—we find the record fails to disclose that the accused objected to the charge as given, or offered any instruction whatever for the consideration of the court to be given in this case. It is a well-settled rule of law that, in the absence of objection and exception to instructions given by the court, the accused (except in capital cases) is presumed to be satisfied with the charge as given, and waives his right to have the appellate court consider any objection he may afterwards find to the charge as given.

This question is well settled by our own Supreme Court in the case of *Thomas Douthitt et al. v. Territory of Oklahoma*, 7 Okla., 55, 54 Pac. 312. First syllabus:

"In a criminal case, in the absence of any request by the defendant for specific instructions, it will be held that the defendant was satisfied with the instructions as given."

Also in the case of *William Huff v. Territory of Oklahoma*, 15 Okla., 376, 85 Pac. 241. Second syllabus:

"Where erroneous rulings and decisions of the trial judge are not excepted to at the time and exceptions properly saved, such errors will be treated as waived by the party affected, and objections will not be considered for the first time in this court."

Indian Territory Court of Appeals, in the case of *Bias v. United States*, 3 Ind. T. 27, 53 S W. 471, held.

"'There is no distinction between criminal and civil cases with regard to the necessity of saving exceptions. It is just as necessary that error be properly excepted to in a criminal case as in a civil case."

See, also, *State v. Bates*, 38 La. 491; *State v. Holcombe*, 41 La. Ann. 1066, 6 South 758; *Buel v. People*, 78 N. Y. 492, 34 Am. Rep. 555; *Mitchell v. Com.*, 75 Va. 856; *Stone v. State*, 42 Ind. 418.

There being no prejudicial error disclosed by the record, the judgment of the court below is affirmed at the costs of the plaintiff in error, and the sheriff of Pottawatomie county is directed to proceed at once to execute the judgment of the court below.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

FRANK BUCK v. TERRITORY.

No. 2171, Okla. T. Opinion Filed January 11, 1909.

(98 Pac. 1017.)

1. **TRIAL—Arguments of Counsel—Objection.** (a) When the prosecuting attorney goes out of the record and makes improper remarks, calculated to prejudice the rights of the defendant, it is the duty of counsel for the defense to promptly interpose an objection to such remarks, and move the court to withdraw them from the consideration of the jury, and to instruct the jury not to consider such remarks.
(b) It is too late to interpose objections to improper remarks of the prosecuting attorney in his argument to the jury, after the argument has closed, unless the remarks were of such a character that their withdrawal from the consideration of the jury would not cure the error committed in their utterance.
(c) If counsel for the defense go out of the record and make remarks not authorized by the evidence, they cannot be heard to complain if counsel for the prosecution are permitted to go outside the record in replying to such statements.
(d) When it is claimed that counsel for the prosecution went out of the record, and made improper remarks, calculated to prejudice the defendant, and the trial judge certifies in the record that such remarks were made in reply to remarks not authorized by the evidence made by counsel for the defense, such certificate is permissible; and, in the absence of any showing in the record to the contrary, the appellate court is bound by such certificate of the trial judge.

2. **LARCENY—Evidence.** See case for statement of evidence, which not only sufficiently corroborates the testimony of an accomplice, but which establishes the guilt of the defendant independently of the testimony of the accomplice.

3. **TRIAL—Exceptions to Instructions.** (a) See opinion for objections of the court to the practice of taking exceptions to each and all of the instructions given to the jury, which practice, while permissible under section 5518, Wilson's Rev. & Ann. St. 1903, is not to be commended.
(b) See instruction on alibi, which, while not indorsed as a model, is held sufficient under the facts in this case.
(c) The laws of Oklahoma are to be liberally construed in the furtherance of justice, and a conviction will not be reversed upon a technicality which does not affect the substantial rights of the defendant.

(Syllabus by the Court.)

Appeal from District Court, Woods County; J. L. Pancoast, Judge.

Frank Buck was convicted of larceny, and appeals. Affirmed.

On the 5th day of December, 1906, Frank Buck (hereinafter called defendant) was found guilty in the district court of Woods county, Okla., upon an indictment wherein defendant was charged with the larceny of domestic animals, and was sentenced by the court to six years' imprisonment in the territorial prison. Defendant filed a motion for a new trial, which was overruled by the court; to which defendant duly excepted. An appeal was taken to the Supreme Court of Oklahoma Territory. Upon the admission of the state of Oklahoma into the Union, under the provisions of the Constitution of the state and the Enabling Act, this case was transferred to the Supreme Court of the state. When the Criminal Court of Appeals of Oklahoma was established as directed by law, the case was transferred to this court by the Supreme Court of the state of Oklahoma.

Wm. Briggs, for appellant.—

On question of misconduct of attorney in argument: Abbott's Trial Brief, 605; *People v. Quick,* 58 Mich. 321, 23 N. W. 302; *Martin v. State,* 63 Miss. 505, 56 Am. Rep. 812; *Hardke v. State,* 67 Wis. 552, 30 N. W. 726; *Hamilton v. State,* 97 Tenn. 452, 37 S. W. 194; *People v. Dane,* 59 Mich. 550, 26 N. W. 781; *State v. Smith,* 75 N. C. 306; *People v. Mitchell,* 62 Cal. 411; *Cross v. State,* 68 Ala. 476; *Furguson v. State,* 49 Ind. 33; *Greene v. State,* 17 Tex. App. 395; *Martin v. State,* 63 Miss. 505; *People v. Kramer,* 117 Cal. 647, 49 Pac. 842.

On question of proper instruction on alibi: *Shoemaker v. Territory,* 4 Okla. 118; *French v. State,* 12 Ind. 670; *State of Iowa v. Reed,* 17 N. W. 150.

W. C. Reeves, Asst. Atty. Gen., and *Charles Swindall,* for the Territory.—

On question of improper remarks of prosecuting attorney: *People v. Shears* (Cal.) 65 Pac. 295; *State v. O'Keefe* (Nev.) 43 Pac. 915; *State v. Regan* (Wash.) 36 Pac. 472; *Commonwealth v. Tripp* (Mass.) 32 N. E. 905.

On the question of proper instruction on alibi: 12 Cyc. 619; *People v. Winters,* 57 Pac. 1067.

FURMAN, PRESIDING JUDGE (after stating the facts as above). First. One ground relied upon by the defendant to secure a reversal of the conviction in this case is the allegation that he was prejudiced by improper remarks made by the county attorney in his closing argument to the jury. It is the privilege and duty of counsel for the defense whenever the prosecuting attorney goes out of the record and makes improper remarks calculated to prejudice the defendant, to promptly interpose an objection thereto and move the court to exclude the remarks so made and instruct the jury that they are improper and must not be considered by them. It is not good practice for counsel for the defense to sit silently by and make no objections to supposed improper remarks of the prosecuting attorney until after the argument is concluded, as was done in this case. As a general rule, it is then too late to present such matters to the trial court. Good faith and fairness to opposing counsel and the trial court require that objections should be presented in time to prevent, if possible, the commission of error at any stage of a trial. Cases may, however, arise in which the remarks complained of are of such a flagrant character that their withdrawal from the jury would not cure the error committed in their utterance. In such cases the objection may be made after the argument is concluded, but the safe and fair practice is always to check improper argument at the earliest possible moment; otherwise there is danger of waiving any rights which may arise therefrom.

When this matter was presented to the trial judge, after the conclusion of the argument, he appended to the motion of the defendant this statement:

"All of said statements, however, were made by the county attorney in the way of argument. and were made in answer to statements upon the same subject made by counsel for the defendant."

In the absence of any showing to the contrary, we must accept this statement of the trial court. If counsel for the defense go out of the record and make statements not supported by the evidence, they cannot be heard to complain if counsel for the prosecution is permitted to reply to such statements. We, therefore, hold upon the record as presented that no error was committed in this matter of which defendant has just cause to complain.

We are sustained in these views by the following authorities:

"Remarks of the prosecuting attorney which ordinarily would be improper are not grounds for exceptions if they are provoked by the defendant's counsel, and are in reply to his statements." (12 Cyc. p. 582.)

We could cite authorities without limit to the same effect, but the principle announced is so just that we deem further citation of authority unnecessary. The Supreme Court of California, in the case of *People v. Shears,* 133 Cal. 154, 65 Pac. 295, uses this language:

"A new trial should not be granted for improper remarks of the district attorney, where defendant merely excepted to the statement, since its effect would have been removed if defendant had asked the court to instruct the jury to disregard it."

The Supreme Court of Nevada, in the case of *State v. O'Keefe,* 23 Nev. 127, 43 Pac. 918, 62 Am. St. Rep. 768, says:

"Argument of the prosecuting attorney that defendant's failure to call as witnesses his alleged accomplices was evidence of his guilt is not ground for reversal, where defendant failed to request the court to instruct the jury to disregard such argument, though at the time objected thereto, and excepted to denial of his motion to strike out the same."

In the case of *State v. Regan,* 8 Wash. 506, 36 Pac. 472, the Supreme Court of Washington uses this language:

"Statements of the prosecuting counsel unwarranted by the evidence are no ground for error unless the defense has first moved the court to strike them out, or tell the jury to disregard them."

See, also, *Commonwealth v. Tripp,* 157 Mass. 514, 32 N. E. 905; 12 Cyc. 584, 585.

Second. The defendant challenges the sufficiency of the evidence to sustain the verdict of the jury. The evidence in substance is as follows:

J. G. Bitner testified that he was the owner of the cattle described in the indictment, and that they were in the pasture of Sam Press in September, 1905, that he had never given the defendant or Ray King his consent to take said cattle, and that he had never sold said cattle to Ray King or the defendant.

Ray King, an accomplice, testified that this defendant and witness went to the pasture of Sam Press and stole the cattle of Bitner, described in the indictment. Defendant said they would drive the cattle off and sell them. Witness and defendant drove the cattle about five miles away, and placed them in Archer's pasture, and left them there. That witness never saw the cattle again until they were brought back by the Press boys to the place from which they had been stolen.

Samuel Press testified that the five head of cattle described in the indictment belonged to J. G. Bitner, and were in a pasture controlled by his brother, George, and himself, in Woodward county, Okla. T., and were taken from said pasture about the 15th day of September, 1905; that witness saw defendant riding a brown horse, about 2 o'clock on the afternoon of September 14, 1905; that defendant was riding right along the line between the place of witness and King; that defendant was not on a road, but was in a horse pasture. Witness saw the cattle that were stolen on Friday morning, and missed them on Sunday morning. Witness hunted for the missing cattle, and found one of them on Wednesday, and another on Thursday, in Archer's pasture. Witness found the other two stolen cattle on the 12th day of November, in what is called the Texas pasture. When witness saw defendant on the 14th day of September, defendant was just outside the fence of the pasture of witness. He was riding a brown horse, and had on a light hat, a light shirt, light pants, and red boots. "The cattle of Bitner were taken from our pasture without my knowledge and consent."

George Press testified: On or about the evening of the 16th of September, 1905, a little before sundown, witness saw defendant in the pasture of witness and his brother down near a creek. Ray King was with defendant. They were riding north. Defendant and King were about half a mile from the house of witness.

On the morning of the 14th of September, 1905, witness saw defendant. He was riding a horse belonging to Ray King. Defendant asked witness where Mr. King lived, and upon being told, rode off in that direction. Testified substantially as the witness Samuel Press had done as to the cattle of Bitner being missed from the pasture, and the search made for them, and their recovery. Also that there were four or five fences and gates between the pasture from which the cattle were missed and where they were found, and that the fence around the pasture from which the cattle were missed was in good repair.

Jennie Pimlot testified: Saw defendant at the house of the home of the father of Ray King about sundown on the 15th day of September, 1905. "When I first saw him he was coming out of a little creek that runs west of King's house. Defendant and Ray King came to the house together."

John F. Nicholson testified: Knows defendant and Ray King. On the 15th day of September, 1905, they came west from George Press's home about three-quarters of a mile. They had a rope on a steer belonging to Bitner. "When I next saw this steer he was in Archer's pasture." Does not know whether defendant and King saw witness.

A number of other witnesses testified for the prosecution, but it is not deemed necessary to incumber the recard with a statement of their evidence. Defendant set up the defense of an alibi. It was supported by the testimony of five witnesses besides the defendant. The jury saw all of these witnesses and heard their testimony. They accepted the testimony ot the prosecution, and rejected the testimony of the defendant. We think that the testimony for the prosecution is amply sufficient to sustain the verdict.

Third. After the instructions of the court had been read to the jury, the record contains the following statement:

"The defendant excepts to each and every instruction given by the court, and to the refusal of the court to give the instructions offered on behalf of the defendant."

In the case af *Rhea v. United States,* 6 Okla. 258, 50 Pac. 992, the following exceptions were held good:

"To the giving of each and every and all of said instructions to the jury by the court the defendant excepted separately at the time, and still excepts."

The Supreme Court of Oklahoma Territory based this ruling upon a number of Kansas cases, but said: "The method pursued is not to be commended." We fully agree with this statement. We think that this practice is to be condemned. We regard it as unfair to the trial judge, and unjust to the state. In one paragraph of an instruction, as a mere matter of inadvertence, an error may have been made which, if specifically called to the attention of the court, would have been corrected; but, under the practice approved, but not commended, a defendant by stating that he "excepts to each and every and all of the instructions given by the court separately" can cover up his real exception, and if the hazard of the legal battle turns against him, he can in the appellate court abandon his other exceptions, and rely alone upon the inadvertent error, and thus defeat the ends of justice and secure a reversal at great expense to the state, when, if he had presented his real objection openly and fairly, and in good faith, the trial court would have corrected the error before harm was done. This practice enables designing lawyers to dig pitfalls and lay ambuscades for the trial court. No end of justice is promoted by this rule. It cannot serve a single fair purpose in the trial of a case, and results in evil and injury, rather than in fair play and justice. The purpose of an exception is two fold. It should notify the trial court of the specific objection relied upon. The presumption of law is that no judge commits willful error. If his attention is called to the specific objection, the presumption of law is that he will correct any error that may be pointed out. If the court fails to make the correction, then the exception preserves the matter alleged to be error, for review in this court. Unless the trial court is put upon notice of the specific point relied upon as error, and if such point can be pointed out for the first time in this court, then this is a court of original jurisdiction, when, as a matter of fact, as to such matters, this court has appellate jurisdiction only.

The competent and careful lawyer investigates the legal questions involved in his cases before he tries them, and should be able to detect and except to errors in the instructions given at the time. Any fair judge should, and doubtless would, give reasonable time in which counsel can look over and note exceptions given before they are read to the jury. A refusal to do this would render the trial unfair, which would be in violation of the Constitution, which guarantees to every defendant a fair trial, and would be ground for reversal, if it appeared that any portion of the instructions given were prejudicial to the defendant. It may be urged that the practice saves time. It may save a little time during each trial, but it may result in the loss of much more time, and in great expense to the state, and in the defeat of justice, by requiring the reversal of cases on account of the errors which would have been cured if the attention of the trial court had been specifically called to them in apt time. Lawyers should present questions fairly and fully in the trial court. They should do this as an act of justice to themselves, opposing counsel, the trial judge, and the state of Oklahoma. To say that an exception is taken to each, and all, and every paragraph, in instructions given to a jury separately, amounts only to a general exception, unless shadow is of more value than reality. Such exceptions do not carry the stamp of good faith upon their face. It is not believed that such exceptions are taken because counsel honestly believed that there was error in each paragraph in an instruction to a jury. It is an ambush, a subterfuge, a mockery, a snare, and a delusion. We are discussing the principle involved in this practice, and are showing its rank injustice. No personal reflections are intended to be cast upon counsel We are simply pointing out the abuses which will creep into our system of criminal jurisprudence if this practice is allowed to be continued.

We think that the correct rule is laid down in *Peace v. State*, 27 Tex. App. 03, 10 S. W. 762. Judge White there said:

"A general rule well established is that 'a bill of exceptions taken generally to the charge of the court, specifying no particular error or errors, has no standing, and will not be considered by this court. In the absence of a proper bill of exceptions this court will examine the charge of the trial court only with regard to fundamental errors, or such as under all the circumstances of the case were calculated to injure the rights of the accused.' *Smith v. State,* 22 Tex. App. 316, 3 S. W. 684; *Williams v. State,* 22 Tex. App. 497, 4 S. W. 64; *Cordway v. State,* 25 Tex. App. 405, 8 S. W. 670."

In the case of *Wilson v. People,* 3 Colo. 331, the Supreme Court of that state said:

"A general exception was taken to the instruction *en masse.* We have decided at this term, in the case of *Webber v. Emerson,* 3 Colo. 248, that such an exception, if any distinct part of the charge is sound, will not be considered. This exception comes within the rule there laid down."

The Supreme Court of Massachusetts, in *Commonwealth v. Tolman,* 149 Mass. 236, 21 N. E. 380, 3 L. R. A. 747, 14 Am. St. Rep. 414, says:.

"Under a general exception or objection to a charge, one cannot be allowed to select afterwards particular phrases and found special exceptions thereon. *Curry v. Porter,* 125 Mass. 94; *McMahon v. O'Connor,* 137 Mass. 216; *Wright v. Wright,* 139 Mass. 177, 29 N. E. 380."

In *Commonwealth v. Meserve,* 154 Mass. 75, 27 N. E. 997, the Supreme Court said:

"The judge's attention was not called to any particular defect or insufficiency or inaccuracy in his instructions to the jury, but at the close of the charge the defendants enumerated 20 different portions of the charge to which they excepted, embracing all the four counts which were submitted to the jury, but with no further specification of what they complained of, or wherein they wished for different rulings. Now in such a case, if any fundamental error in principle is discovered, or anything by means of which it seems probable that injustice may have been done, the defendants should have the benefit of it. But under such circumstances it would hardly conduce to a due administration of justice to search out opportunities for making minute verbal criticisms of the language of the charge, or to look for omissions to say all that might properly have been said."

In *People v. Bristol,* 23 Mich. 126, the record shows that the following exception was reserved: "The defendant excepted in due form to the refusals to give the charges requested, and to each and every part of the charge given specifically." The Supreme Court dismissed the matter with this remark: "The exception to the charge is too general."

In *Van Stone v. Bierce Manufacturing Company,* 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961, the court says: "A general exception to the charge of the court as a whole cannot be considered."

An exception which challenges each and every paragraph in an instruction should be treated as a general exception to the instructions given, it matters not in what language it may be couched, unless we consider form rather than substance. We could cite pages of authorities in support of our position, but deem it unnecessary to do so. We have expressed our views fully upon this question for the purpose of calling the attention of the bar and the Legislature to what we conceive to be a great evil, which has grown up in our practice on account of section 5518, Wilson's Rev. & Ann. St. 1903, which is as follows:

"(5518) 382. In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case it must in addition inform the jury that they are the exclusive judges of all questions of fact. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused the court must indorse or sign its decision. If part of any written charge be given and part refused the court must distinguish, showing by the indorsement or answer what part of each charge was given and what part refused."

This was taken from the statutes of Kansas, and it was upon this statute and the decision rendered thereon by the Supreme Court of Kansas, that the Supreme Court of Oklahoma Territory rendered the opinion in the case of *Rhea v. United States,* 6 Okla. 258, 50 Pac. 992. We feel bound by the statute, and the decisions above referred to, but at the same time we regard it as our duty to express our condemnation of the rule. It places a premium upon carelessness, and ignorance upon the part of the attorneys, and if permitted to stand will result in great expense to the state, and even to the defeat of justice in many cases, by forcing this court to reverse convictions on account of errors which might have been prevented, and when the defendants are guilty, and which reversals would be avoided but for this statute.

Under the general exceptions reserved in this case counsel for the defense urge in this court specific objections to instruction No. 7, given by the court to the jury, which is as follows:

"No. 7. You are further instructed that one of the defenses interposed in this case by the defendant is what is known in law as an alibi; that is, that the defendant was at another place at the time the crime was committed, if the crime was committed. The defense of alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged, if one was committed, the accused was at another place, so far away and under such circumstances that he could not, with ordinary exertion, have reached the place where the crime was committed so as to have participated in the commission thereof. In considering the proof upon the question of alibi you will consider the whole of the evidence, both that given for the defendant and for the territory applying the same rules as are applied to any other evidence, the law being that when the jury have considered all of the evidence, as well that touching the question of alibi as the criminating evidence introduced by the prosecution, then if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, then the jury should acquit. Given exception. J. L. Pancoast, Judge.

We do not regard this instruction as a model, and we do not advise trial courts to follow it. It would have been better to have informed the jury in clear and affirmative terms that, if upon the evidence of an alibi they entertained a reasonable doubt as to the presence of the defendant at the time and place of the commission of the offense charged, they should acquit him. But, in view of the clear and overwhelming nature of the evidence as to the guilt of the defendant we do not think that any injury to his substantial rights has been committed. If the evidence had been less satisfactory upon this question, we would feel constrained to reverse the conviction. It is not, however, every inaccuracy in an instruction in a case that will necessarily result in a reversal. Section 5144, Wilson's Rev. & Ann. St. 1903, declares that the statutes are to be construed "in the furtherance of justice." Section 5618, Wilson's Rev. & Ann. St. 1903 is as follows:

"(5618) 482. On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

We have carefully examined all of the assignments of error in connection with the motion for a new trial in this case, and fail to find any material errors which affect the substantial rights of the defendant. The judgment of the lower court is, therefore, in all things affirmed.

BAKER and DOYLE, JUDGES, concur.

In re GEORGE W. McNAUGHT.

No. A48. Opinion Filed January 11, 1909.

(99 Pac. 241.)

1. **CONSTITUTIONAL LAW—"Due Process of Law"—Indictment by Grand Jury.** The words "due process of law" in the fifth and fourteenth amendments to the Constitution of the United States, and in section 7 of the Bill of Rights of the Constitution of Oklahoma (Bunn's Ed. sec. 16), do not necessarily require an indictment by a grand jury in a prosecution by the state for the crime of murder committed after statehood.

2. **INDICTMENT AND INFORMATION—"Information"—Officer Authorized to File.** In England, at common law, an "information" was an accusation of a criminal character exhibited against a person charging him or her with a criminal offense by the Attorney General or the Solicitor General and under his oath of office. In the United States, in the absence of statutes changing its character, it is filed by the

officer, whatever his title, who exercises the function of prosecuting attorney for the county.

3. **SAME—Concurrent Remedies in Felonies.** The Constitution of Oklahoma (Const. art. 2, sec. 17 [Bunn's Ed. sec. 26]) authorizes prosecutions for felonies by information after examination and commitment by a magistrate without indictment by a grand jury. The criminal procedure act, being chapter 18, Gen. St. 1908, makes provisions for a preliminary examination before a committing magistrate in the presence of the accused, who is entitled to the aid of counsel and the right of examination of witnesses, whose testimony may be reduced to writing at his request; and upon a finding by the magistrate that a felony has been committed, and that there is sufficient cause to believe the accused guilty thereof, an order, holding him to answer thereto before the district court of the county in which the offense is triable, shall be made, and the prosecution in that county may be by indictment or information, as they are concurrent remedies.

4. **CONSTITUTIONAL LAW—Prosecution by Information—Self-Executing Provisions.** The provision of the Constitution that provides for and authorizes the prosecution of felonies by information after the accused has had a preliminary examination before an examining magistrate, or having waived such preliminary examination (being section 17 of the Bill of Rights [Bunn's Ed. sec. 26]), is self-executing from the time of the organization of this state.

5. **INDICTMENT AND INFORMATION.** A conviction after examination and commitment upon a written complaint charging the crime of murder, committed after statehood, upon information duly verified and filed in the district court for murder, and a trial, and conviction of manslaughter in the first degree, and sentence for life imprisonment thereon, are not illegal and void.

6. **HABEAS CORPUS—Judgment Valid on Face.** Section 2411, Gen. St. 1908, provides: "No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: * * * (2) Upon any process issued on and final judgment of a court of competent jurisdiction; * * * (4) Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." And a judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of habeas corpus issued for the relief of a prisoner imprisoned by virtue of such judgment.

7. **SAME—Grounds for Relief—Irregularities in Selection of Jury.** Irregularities in the selection and impaneling of the trial jury do not affect the jurisdiction of the court so as to justify release by habeas corpus of a person so convicted.

8. **SAME—Scope of Review.** The review of a judgment of conviction and imprisonment by writ of habeas corpus is limited to the questions: Had the court which rendered the judgment jurisdiction of the subject-

matter and of the person convicted? And did the court in the course of the proceedings which resulted in the judgment exceed its jurisdiction?

9. **SAME—Grounds for Relief—Sentence Excessive.** If the vice of the sentence relied on is that it is oppressive and excessive in character, and not that it is of an entirely different character from that authorized by law, to the extent that it is void, the prisoner will be remanded.

10. **SAME—Remedy by Appeal.** The Criminal Code of Oklahoma provides that: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction, may in its discretion sentence such offender to imprisonment during his natural life, or for any number of years not less than such as are prescribed." And the Criminal Court of Appeals will not on **habeas corpus** review the question of excessive punishment. (Syllabus by the Court.)

Original application by George W. McNaught for a writ of *habeas corpus.* Writ denied, and petitioner remanded.

The petitioner, George W. McNaught, was convicted in the district court of Kingfisher county of manslaughter in the first degree, and he was sentenced to life imprisonment in the state penitentiary under an information filed by the county attorney of said county. On December 7, 1908, he filed in this court a petition signed and verified by his oath, and which, omitting the formal parts, was as follows:

"Comes now George W. McNaught of Kingfisher, Oklahoma, and alleges: That on the 28th day of September, 1908, the same being a regular judicial day of the September, 1908, term of the district court sitting in and for the county of Kingfisher, state of Oklahoma, M. W. Hinch, the county attorney of Kingfisher county, in said state, filed in said district court a certain information, a copy of which is hereto attached and marked 'Exhibit A' and made a part hereof, the same as if written herein in full, charging your petitioner with the crime of murder. That thereafter, to wit, on the 29th day of September, 1908, your petitioner duly appeared in open court and entered his plea of not guilty to said information. That thereafter, and during the said term of said district court, your petitioner was placed upon trial and tried in open court upon said information and plea thereto before said district court and a jury, and thereafter and during said term of court, to wit, on the 20th day of October, 1908, said jury returned into open court with its verdict in said cause finding your petitioner guilty of manslaughter in the first degree, a copy of which verdict is hereto annexed marked 'Exhibit B' and is made a part hereof, the same as if written in full; and said verdict was received and filed in open court, and the jury was thereupon discharged, all without the consent of and over the protest and objection of your petitioner. That thereafter, and during said term of court, to wit, on the 23d day of October, 1908, said district court, in open court and in the presence of your petitioner, rendered judgment and sentence on said verdict against your petitioner, and adjudged your petitioner guilty of manslaughter in the first degree, as charged in the second count of said information and as found by the verdict of said jury; and that your petitioner, for said offense, be punished by being imprisoned in the state penitentiary for and during the term of his natural life. And said court further ordered that the sheriff of Kingfisher county, Oklahoma, immediately transport your petitioner to said penitentiary and deliver him to the warden or keeper thereof, and by said warden or keeper receive and confine him in said penitentiary according to the judgment and sentence of the court. A true, full, and complete copy of said judgment and sentence is hereto annexed, marked 'Exhibit C' and made a part hereof as if written herein in full. That thereafter, to wit, on the 24th day of October, 1908, the said district court adjourned (*sine die*) for said term and is not now and has not been in session since the 24th day of October, last. That ever since said judgment was rendered your petitioner has been and is now unlawfully restrained of his liberty and confined in the common jail of Kingfisher county, Oklahoma, by M. M. Tate, the duly elected, qualified, and acting sheriff of said county of Kingfisher, under and by virtue of said judgment and sentence, and said sheriff is about to, and will, unless restrained by order of court, unlawfully execute said judgment and sentence by taking and transporting your petitioner to said penitentiary as in said judgment ordered.

"That the jury, before whom your petitioner was tried, was selected by order of the judge of said district court from a jury list made and selected by the jury commissioners appointed by an order of the judge of said district court, dated January 6, 1908, according to and in pursuance of an act of the Legislature of the state of Oklahoma, approved December 21, 1907, which act was repealed by the act of said Legislature approved February, 1908, and no jury commissioners were ever appointed under said last-mentioned act by order of said district court or the judge thereof. That the said list from which said trial jury was selected, drawn, summoned, and impaneled was made, returned and filed on the ——— day of January, 1908. That after filing his plea and before the jury, before whom your petitioner was tried, was sworn to try said cause, your petitioner challenged said jury panel for the reason that said jury was not selected and drawn as required by law (in accordance with said act of February 21, 1908), and your petitioner was put illegally upon said trial over his protest and objections, all properly made and taken and in proper time.

"That said judgment and sentence is absolutely null and void for the following reasons, to wit: First. That said district court had no jurisdiction to try your petitioner on said information. Second. That the jury before whom your petitioner was tried was illegally selected, drawn, summoned, and impaneled, to try said cause, and said verdict is absolutely null and void. Third. That said district court had no jurisdiction to render said judgment and pass said sentence, and same is cruel, unjust, and absolutely void and contrary to and in violation of the laws and Constitution of the state of Oklahoma and the Constitution of the United States.

"Wherefore your petitioner prays that a writ of *habeas corpus* may issue forthwith requiring the sheriff of Kingfisher county, Oklahoma, to forthwith have and produce the body of your petitioner before this honorable court, and show cause why he is restrained and imprisoned, and that upon the final hearing herein your petitioner may be discharged.

George W. McNaught,
By J. P. Cummings,
F. P. Whistler,
D. K. Cunningham,
His Attorneys."

On December 7, 1908, the writ was allowed as prayed for, by the writer of this opinion, as one of the Judges of the Criminal Court of Appeals, and made returnable December 15, 1908. An order was also made restraining the sheriff from removing petitioner to the penitentiary pending the determination of this proceeding; and on the 15th day of December, 1908, the return of the sheriff of Kingfisher county was filed in this court, which, omitting the formal parts, is as follows, to wit:

"Comes now M. M. Tate, sheriff of Kingfisher county, Oklahoma, and for his return and answer to the writ served upon him herein, states: That he has not at this time the body of George W. McNaught before this court, for the reason that the production of said body has been waived by a certain instrument of writing, hereto attached, marked 'Exhibit A,' and made a part of this return. Said sheriff further says that he has the body of of said George W. McNaught in his custody by reason of a certain judgment and sentence of the district court of Kingfisher county, Oklahoma, and a commitment issued by said court, and the judgment thereof, in the case of the State of Oklahoma v. George W. McNaught, being the same case described in the petition of applicant herein, which said judgment, sentence, and commitment is hereto attached, marked 'Exhibit B,' and made a part hereof. That on the 21st day of November, 1908, an order was made by the judge of the district court of Kingfisher county, Oklahoma, extending the time within which to make and file a bail bond by said McNaught, for a period of forty (40) days, a copy of which order is hereto attached, marked 'Exhibit C,' and made a part hereof. M. M. Tate."

And said return was verified by the oath of said M M. Tate, sheriff of Kingfisher county, Okla. The attorneys for petitioner also filed a waiver of the presence of the petitioner as follows:

"We, D. K. Cunningham, one of the attorneys of record for petitioner, and M. W. Hinch, county attorney, and Bradley & Bradley, attorneys for the county of Kingfisher, Oklahoma, and Charles West, Attorney General for the state of Oklahoma, M. M. Tate, sheriff of Kingfisher county, Oklahoma, do hereby expressly waive the production of the body of George W. McNaught before the Criminal Court of Appeals at the city of Guthrie, Oklahoma, and the personal appearance of said sheriff, on the return day of the writ issued herein, and also on the hearing of said matter for writ of *habeas corpus* before the said court, and agree that the same may be heard in the absence of said petitioner; and the petitioner hereto agrees that the hearing herein may be had at Guthrie, Oklahoma, on the 16th day of December, 1908, at 10 o'clock a. m., or as soon thereafter as same can be heard by the court."

On December 22d and 23d, the case was orally argued, briefs filed, and the case submitted.

D. K. Cunningham, F. P. Whistler, and *J. P. Cummings,* for petitioner.—

On the legality of prosecuting felonies by information: 8 Cyc. 729, 750 d, 758 e, (4), 760 (6); *State v. Ah Jim* (Mont.) 23 Pac. 76; *In re Durbon* (Mont.) 25 Pac. 442.

M. W. Hinch, Bradley & Bradley, Chas. West, Atty. Gen. and *W. C. Reeves,* Asst Atty. Gen., for respondent. The brief for respondent did not reach the Reporter.

DOYLE, JUDGE. (after stating the facts as above). The counsel for petitioner at the outset contend that his trial, conviction, and sentence and his restraint is in violation of his rights under the Constitution and the laws of the state of Oklahoma and the Constitution of the United States; that it appears upon the face of the judgment that the petitioner has never been legally or otherwise presented or indicted by a grand jury, and that he was proceeded against by information made, verified, and filed by the county attorney of Kingfisher county after examination and commitment by a magistrate of the said county; that he has been tried and illegally found guilty of manslaughter in the first degree, and that the judgment rendered upon the verdict of the jury in said case was and is void, and, if executed, would deprive the petitioner of his liberty for life without "due process of law," on the ground that the proceedings, as had, are repugnant to the fifth amendment, and that clause of the fourteenth amendment to the Constitution of the United States which is in these words, "Nor shall any state deprive any person of life, liberty or property without due process of law"; and section 7, Bill of Rights, Const. Okla. (Bunn's Ed. § 16), which is as follows: "Section 7. No person shall be deprived of life, liberty, or property ,without due process of law."

At common law the commission of crimes was charged either by indictment or information, depending in most instances upon the grade of the offense. The indictment was an accusation at the suit of the sovereign, based on the oath of 12 men of the county where the offense was committed. 2 Hawk. P. C. 287.

An information was a surmise, or suggestion upon record made on behalf of the sovereign, to a court of criminal jurisdiction, charging a person with a misdemeanor. *U. S. v. Tureaud* (C. C.) 20 Fed. 621.

Informations under the ancient rule were of two kinds: First, such as were merely at the suit of the King; secondly, such as were partly at the suit of the King and partly at the suit of the party. 2 Hawk. P. C. 356.

Blackstone, speaking of criminal informations in discussing the two kinds exhibited in the name of the King, observes: First, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the Attorney General; secondly, those in which, though the King is the common prosecutor, yet it is at the relation of some private person or the common informer, and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office, who is for this purpose the standing officer of the public.

In the reign of Henry VII. the remedy by information, exhibited by leave of the court by the Master of the Crown Office, became the means of great oppression to the subjects of England, and so continued with little abatement until St. 4 & 5 W. & M. c. 11, § 18, which provided, in effect, that the clerk of the crown, in the court of the King's Bench, should not, without express authority to be given by the court when in session, exhibit, receive, or file any information for any of the causes for which it was allowed, nor issue any process thereon, without taking a recognizance from the person procuring such information to be exhibited; but that the act should not extend to any other information than such as should be exhibited in the Court of the King's Bench by the Master of the Crown Office. 2 Hawk. P. C. 358.

Sir James Fitz James Stevens, in his history of the Criminal Law of England (vol. 1, p. 296), in referring to the act of 1692 regulating informations exhibited by the Master of the Crown Office, says:

> "The practical result of this statute has been to make a move for a criminal information practically equivalent to a proceeding before magistrates in order to the committal of the accused."

This distinguished jurist, on the page of his valuable work preceding that from which the foregoing excerpt is taken, in referring to the statute of 1494, 2 Henry VII. c. 3, remarks: "This act was the one under which Empsom and Dudley earned their obscure infamy."

Blackstone, alluding to the act last referred to, and also to another ordained in the reign of the same sovereign, makes the following statement:

> "But when the statute 3 Henry VII, c. 3, had extended the jurisdiction of the Court of Star Chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the statute Henry VII, c. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes, or before justices of the peace, who were to hear and determine the same according to their own discretion, then it was that the legal and orderly jurisdiction of the Court of King's Bench fell into disuse and oblivion, and Empsom and Dudley (the wicked instruments of King Henry VII), by hunting out obsolete penalties and this tyrannical mode of prosecution, with other oppressive devices continually harrassed the subject and shamefully enriched the crown." (Blackstone, Com. 310.)

> "It was the feeling undoubtedly entertained by the citizens of this country, that a violation of the rights of personal liberty as produced in England in the reign of King Henry VII might possibly be repeated to their injury, that prompted Congress to propose and secure the adoption of the fifth amendment to the Constitution of the United States, as this amendment was never intended to limit the power of the states in respect to

their own people, but was designed to operate on the national government only." (*State v. Guglielmo,* 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466; *Spies v. Illinios,* 123 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80; *Bolin v. Nebraska,* 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382.)

In the case of *Hurtado v. People of California,* 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232, the plaintiff in error having been examined and committed for murder, the district attorney informed against him for that crime, and he was convicted and sentenced to death, and the question was whether this was "due process of law." That eminent jurist, Justice Mathews, in delivering the opinion of the court (Justice Harlan alone dissenting), construing a provision of the Constitution of California, adopted in 1879, being article 1, § 8, which provides as follows: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law . A grand jury shall be drawn and summoned at least once a year in each county"—in part says:

"The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that 'due process of law,' when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law.

"The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the states have been imposed by the fourteenth amendment to the Constitution of the United States.

"The Supreme Court of California, in the judgment now under review, followed its own previous decision in *Kalloch v. Superior Ct.,* 56 Cal. 229, in which the question was deliberately adjudged. Its conclusion was there stated as follows:

" 'This proceeding, as (it) is regulated by the Constitution and laws of this state, is not opposed to any of the definitions given of the phrases "due process of law" and "the law of the land"; but on the contrary, it is a proceeding strictly within such definitions, as much so in every respect as is a proceeding by indictment. It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law.'

"And the opinion cites and relies upon a decision of the Supreme Court of Wisconsin in the case of *Rowan v. State,* 30 Wis. 129, 11 Am. Rep. 559. In that case the court, speaking of the fourteenth amendment, says: 'But its design was not to confine the states to a particular mode of procedure in judicial proceedings for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words "due process of law" in the amendment do not mean and have not the effect to limit the powers of state governments to prosecutions for crime by indictment; but these words do mean law in its regular course of administration according to prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state Constitution and nothing in the fourteenth amendment to the Constitution of the United States which prevents them from doing so.'

"On the other hand, it is maintained on behalf of the plaintiff in error that the phrase 'due process of law' is equivalent to 'law of the land,' as found in the twenty-ninth chapter of *Magna Charta;* that, by immemorial usage, it has acquired a fixed, definite and technical meaning; that it refers to and includes not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which is an essential part of due process of law, in order that he may not be harassed and destroyed by prosecutions founded only upon private malice or popular fury.

"This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which in *Jones v. Robbins,* 8 Gray (Mass.) 329, decided that the twelfth article of the Bill of Rights of Massachusetts, a transcript of *Magna Charta* in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies.

"Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of *Magna Charta* and referring to Lord Coke's comment upon it, he says: 'The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice.' This accords with what is said in *Westervelt v. Gregg,* 12 N. Y. 202, 62 Am. Dec. 160, by Denio, J. (page 212): 'The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.' The principle and true meaning of the phrase have never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank v. Okley,* 4 Wheat. 235-244, 4 L. Ed. 559: 'As to the words from *Magna Charta* incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' And the conclusion rightly deduced is, as stated by Mr. Cooley, Const. Lim. 356: 'The principles, then, upon which the process is based, are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.'

"It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray v. Land & I. Co.*, 18 How. 272, 15 L. Ed. 372. There Mr. Justice Curtis, delivering the opinion of the court, after showing (18 How. [U. S.] 276, 15 L. Ed. 374) that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows: 'To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

"But this inference is unwarranted. The real syllabus of the passage quoted is that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: However exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

"This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of *Magna Charta* stood for very different things at the time of the separation of the American Colonies from what they represented originally. For at first the words, *'Nisi per legale judicium parium,'* had no reference to a jury; they applied only to the *pares regni,* who were the constitutional judges in the

Court of Exchequer and *coram rege*. Bac. Abr. Juries (7th Ed.) Lond. n., Reeve, H. L. 41. And as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs, Charters, 143-150.

"The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that, in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, *suum cuique tribunere*. There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will model and shape it into new and not less useful forms.

"The concessions of *Magna Charta* were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case,* 8 Coke, 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the commons.

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power and delegated to their governments, and the provisions of *Magna Charta* were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that, as these broad and general maxims of liberty and justice held in our system a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

* * *

"Such is the often-repeated doctrine of this court. In ***Munn*** *v. Ill.*, 94 U. S. 113-134, 24 L. Ed. 77, the Chief Justice, delivering the opinion of the court, said: 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' And in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678, the court said: 'A trial by a jury in suits at common law pending in state courts is not, therefore, a privilege or immunity of national citizenship which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is according to the law of the land. This process in the states is regulated by the law of the state.'

"And Mr. Justice Miller, in *Davidson v. N. O.*, 96 U. S. 97, 105, 24 L. Ed. 616, after showing the difficulty if not the impossibility of framing a definition of this constitutional phrase, which should be 'at once perspicuous, comprehensive, and satisfactory,' and thence deducing the wisdom 'in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,' says, however, that 'it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' See, also, *Mo. v. Lewis,* 101 U. S. 22-31, 25 L. Ed. 989; *Ex parte Wall,* 107 U. S. 288-290, 2 Sup. Ct. 590, 27 L. Ed. 552.

"We are to construe this phrase in the fourteenth amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the fifth amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions, for the more aggravated crimes under the laws of the United States. It declares that 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself.' It then immediately adds, 'nor be deprived of life, liberty or property, without due process of law.' According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible that, when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if, in the adoption of that amendment, it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The fourteenth amendment,' as was said by Mr. Justice Bradley in *Mo. v. Lewis, supra,* 'does not profess to secure all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.'

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but in the language of Mr. Webster, in his familiar definition, 'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains, and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents, transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

" 'It must be conceded,' said this court, speaking by Mr. Justice Miller, in *Loan Ass'n. v. Topeka,* 20 Wall. 655-662, 22 L. Ed. 455, 'that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is, nevertheless, a depotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wise that this power should be exercised by one man than by many.'

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furthernace of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.

"The Constitution of Connecticut, adopted in 1818, and in force when the fourteenth amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall 'be deprived of life, liberty, or property but by due course of law.' It falls short, therefore, of that measure of protection which it is claimed is guaranteed by *Magna Charta* to the right of personal liberty; notwithstanding which it no doubt justly said in Swift's Dig. 17, that: 'That sacred and inestimable right, without which all others are of little value, is enjoyed by the people of this state in as full extent as in any country on the globe, and in as high a degree as is consistent with the nature of civil government. No individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, unless by virtue of the express laws of the land.'

"Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment, by a magsitrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of any offense of less grade than a felony, except misprision of treason; and, in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments.

"In reference to this mode of proceeding at the common law, and which he says 'is as ancient as the common law itself,' Blackstone adds (4 Com. 305): 'And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment.'"

The views expressed in the foregoing case have been approved and followed in a number of subsequent cases, of which the following are a few: *McNulty v. California,* 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; *State v. Miller,* 43 Neb. 860, 62 N. W. 238; *State v. Ayers,* 8 S. D. 517, 67 N. W. 611; *State v. Baldwin,* 15 Wash. 15, 45 Pac. 650; *State v. Sloan,* 65 Wis. 647, 27 N. W. 616; *Bird v. State,* 77 Wis. 276, 45 N. W. 1126; *In re Dolph,* 17 Colo. 35, 28 Pac. 470; *In re Boulter,* 5 Wyo. 329, 40 Pac. 520; *Hodgson v. Vermont,* 168 U. S. 262, 18 Sup Ct. 80, 42 L. Ed. 461; *Ex parte Converse,* 137 U. S. 524, 11 Sup. Ct. 191, 34 L. Ed. 796; *Baldwin v. Kansas,* 129 U. S. 52, 9 Sup. Ct. 193, 32 L. Ed. 640.

Chief Justice Fuller, delivering the opinion of the court in *Ex parte Converse, supra,* in part says:

"It is not our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, and we are not in passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state Constitution and laws (of the state of Michigan). The single question is whether appellant is held in custody in violation of the fourteenth amendment to the Constitution of the United States, in that the state thereby deprives him of liberty without due process of law, and there is no pretense of an abridgment of his privileges and immunities as a citizen of the United States, nor of his denial of the actual protection of the laws; but the state cannot be deemed guilty of a violation of the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction; and, conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that the conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the state of Michigan are, to the law in its regular course of administration, through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestricted and arbitrary exercise of power as to be utterly void. We repeat, as has been so often said before, that the fourteenth amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, nor with the exercise of that principle, in the adjudication of the courts in the states, in administering the principles provided by the law of the state."

We might well say that in the *Hurtado Case* Justice Mathews' opinion and the dissenting opinion of Justice Harlan contain, pro and con, all that need be said on the great principle involved in the proposition before us; and we must say that the first proposition contended for by the petitioner's counsel has been fully answered by Mr. Justice Mathews and the authorities quoted. The conclusion is irresistible that their first contention is not well taken.

It is further contended by petitioner's counsel that the provision of the Constitution of Oklahoma (section 17 of the Bill of Rights [Bunn's Ed. § 26]) providing for prosecutions by information, is not self-executing, and that section 17 of the Bill of Rights is only a limitation on the Legislature; that it cannot become operative of itself, nor until the enactment by the Legislature of laws defining the details which affect the jurisdiction and limitations of the procedure and the rights and pleadings of the state and the accused, so that the courts may be enabled to carry its provisions into effect, unless otherwise provided for in the Constitution.

A careful analysis of the able, elaborate, and exhaustive arguments, both oral and written, shows that in the end their sole reliance is the decision in the case of *State v. Ah Jim,* 9 Mont. 167, 23 Pac. 76. Chief Justice Blake, rendering the opinion in that case, says:

"There are some provisions of the Constitution which have a direct bearing upon the case at bar, and should be considered. 'No person shall be deprived of life, liberty, or property without due process of law.' Article 3, § 27. 'All criminal laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this Constitution, or the Constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation.' Article 20, Schedule. § 1. 'No crime or criminal offense committed against the laws of the territory of Montana shall abate, or in any wise be affected, by reason of the change from a territorial to a state form of government; but the same shall be deemed and taken to be an offense against the laws of the state, and the appropriate courts of the state shall have jurisdiction over, and to hear and determine, the same.' Article 20, Schedule, § 3. 'Prosecutions for criminal offenses against the laws of the territory of Montana, pending at the time the state shall be admitted into the Union, shall not abate; but the same shall continue and be prosecuted in the name of the state of Montana, and the title of every such action shall be changed to conform to this provision.' Article 20, Schedule, § 7. 'Parties who at the time of the admission of the state into the Union may be confined under the lawful commitments, or otherwise lawfully held to answer for alleged violations of any of the criminal laws of the territory of Montana, shall continue to be so confined or held until discharged therefrom by the proper courts of the state.' Article 20, Schedule, § 29. We are aided in giving effect to the foregoing sections of the Schedule by the introductory clause: 'That no inconvenience may arise by reason of changing from a territorial to a state form of government, it is declared as follows.' It is evident that the clause of the Constitution respecting the information does not execute itself."

The real questions before the court in that case were whether the constitutional provision reducing the number of grand jurors required to investigate criminal charges was *ex post facto* in respect to offenses committed before the Constitution was adopted, and whether a prosecution by information could be sustained for a felony committed before the Constitution was adopted.

The same Chief Justice (Blake) rendered the opinion of the court in the case of *State v. Kingsly,* 10 Mont. 537, 26 Pac. 1066, a well-considered case, the reporter's syllabus of which is:

"Constitutional Law—Prosecution by Information. A conviction in a court of the state for a felony committed in the territory prior to the adoption of the Constitution cannot be sustained where the prosecution was by information, as provided by the Constitution and the act of March 2, 1891, relating thereto, as the provision of the federal Constitution guaranteeing to the accused the right to be prosecuted through the intervention of a grand jury was, at the time of the commission of the offense, the supreme law of the land, and the substitution by the state Constitution of prosecution by information in place of that by indictment, not being a matter affecting the procedure, deprived the accused of a substantial right, and gave said act a retrospective operation"—citing *State v. Ah Jim,* 9 Mont. 167, 23 Pac. 76.

As the information in the *Ah Jim Case* sought to charge an offense committed before statehood, in the territory of Montana, it will be seen that the point relied upon by the counsel was not the decisive question in that case, and it occurs to us that the learned Chief Justice who rendered the opinion failed to give any sufficient or satisfactory reasons for holding that the clause of the Montana Constitution respecting prosecutions by information for offenses committed after statehood does not execute itself. He simply gives a literal construction to article 20, Schedule, § 1, as quoted. Judging from the court's opinion in the *Ah Jim Case,* and the provisions of the Constitution of Montana, as quoted, the case is clearly distinguished from the case at bar.

The Constitution of Okahoma provides as follows:

"Art. 2, § 17. No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint." (Bunn's Ed. § 26.)

"Id. § 18. A grand jury shall be composed of twelve men, any nine of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a judge of a court having the power to try and determine felonies, upon his own motion; or such grand jury shall be ordered by such judge upon the filing of petition therefor, signed by one hundred resident taxpayers of the county; when so assembled such grand jury shall have power to investigate and return indictments for all character, and grades of crime, and such other powers as the Legislature may prescribe. Provided, that the Legislature may make the calling of a grand jury compulsory." (Bunn's Ed. § 27.)

"Id. § 20. In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed. Provided that the venue may be changed to some other county of the state on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel, and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment, or information, together with their post-office addresses." (Bunn's Ed. § 29.)

"Id. § 30. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized." (Bunn's Ed. § 39.)

"Art. 7, § 19, * * * The style of all writs and processes shall be 'The state of Oklahoma.' All prosecutions shall be carried on in the name and by the authority of the state of Oklahoma. All indictments, informations, and complaints shall conclude, 'Against the peace and dignity of the state.'" (Bunn's Ed. § 192.)

When the foregoing provisions of the Constitution are construed together, it is apparent that the manifest intention of the framers was that they should go into immediate effect. The language employed, in itself, is conclusive that these provisions are self-enforcing. Thus we find that section 17 provides for the prosecution of felonies by information, a preliminary examination having first been had or waived by the accused. It is argued that section 5304, c. 68, Wilson's Rev. & Ann. St. Okla. 1903 (section 168, Code Cr. Proc.), which provides that, "Every felony must be prosecuted by indictment in the district court," has not been repealed or modified, and by virtue of section 2, Schedule, art. 24, of the Constitution (Bunn's Ed. § 451), it is now, the law of this state. This section reads as follows:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable shall be extended to, and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

We believe this territorial law is not only repugnant, but is clearly and unquestionably in direct conflict with, and, as a matter of law, repealed by, section 17. Section 18 provides how a grand jury shall be organized, and the number necessary to concur in rendering a true bill; by what power and under what conditions it may be convened; defines its power in criminal matters, and provides that other powers may be lawfully prosecuted; and that the Legislature may make the calling of a grand jury compulsory. These sections, 17 and 18, clearly show that the purpose and intent of the framers of the Constitution was that, ordinarily, prosecutions for felonies were to be by information, from the organization of the state, except that in special instances such prosecutions might be by indictment, and that, in prosecutions for crime by indictment or information, both should be concurrent remedies. Section 20 provides that the accused shall be informed of the nature and cause of the accusation against him, and that he shall have a copy thereof, and that in capital cases, at least two days before the case is called, he shall be furnished with a list of the witnesses that will be called in chief to prove the allegations of the indictment or information, showing the intent to have capital cases prosecuted by information. Section 30 provides no warrant shall issue but upon probable cause supported by oath or affirmation. Article 2, § 17 (Bunn's Ed. § 26), provides what the style of a prosecution by information shall be, and what the concluding words must be. These constitutional provisions, together with the provisions of the criminal procedure, chapter 18 of the Code, provide a full and complete system of procedure for the prosecution of all felonies by information.

The various provisions of our criminal procedure, chapter 18, Gen. St. 1908, regulating proceedings before examining and committing magistrates in cases of persons brought before them upon complaint in writing charging the commission of felonies, require that the testimony of the witnesses be reduced to writing, and provide that the accused shall be represented by counsel, and permit cross-examination of the witnesses, and provide that when it appears that a felony has been committed, and that there is probable cause to believe the accused guilty, then that he shall be held to answer. They further provide that the rule of common law that penal statutes are to be strictly construed has no application to our criminal procedure. This chapter, establishing the law of the state respecting the subjects to which it relates, and its proceedings and all procedure under it, is to be liberally construed with a view to promoting its objects in furtherance of justice. It further provides that proceedings, practice, and pleadings of the district courts in this state in criminal actions on matters of criminal nature, not specifically provided for in the chapter on criminal procedure, shall be in accordance with the proceedings, practice, and pleadings of the common law. These provisions are as follows:

"Art. 1, § 1889. Magistrate to issue warrant. When an information, verified by oath or affirmation, is laid before a magistrate of the commission, of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest."

"Art. 3, § 1935. Duty of magistrate. When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had." (St. 1890, § 5433.)

"Art. 3, § 1936. Defendant allowed counsel. He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must upon the request of the defendant require a peace officer to take a message to such counsel in the county or city as the defendant may name. The officer must, without delay, perform that duty, and shall receive fees therefor as upon service of a subpoena: Provided, however that at any time before the examination is begun, a change of venue may be had, for the same causes and in the same manner, and be transmitted to another justice, as in cases finally triable before a justice of the peace."

"Art. 3, § 1941. Duty of magistrate on examination. At the examination the magistrate must, in the first place, read to the defendant the information on file before him. He must also, after the commencement of the prosecution, issue subpoenas for any witnesses required by the prosecutor or the defendant."

"Art. 3, § 1944. Magistrate must keep deposition. The magistrate or his clerk must keep the depositions taken on the examination, and the statement of the defendant, until they are returned to the proper court, and must not permit them to be inspected by any person except a judge of a court having jurisdiction of the offense, the district attorney of the county, and the defendant and his counsel. A violation of this section is a misdemeanor."

"Art. 4, § 1960. Verified by county attorney. The county attorney shall subscribe his name to informations filed in the county or district court and indorse thereon the names of the witnesses known to him at the time of filing the same, and the names of such other witnesses as may afterwards become known to him, at such time before the trial as the court may by rule prescribe. All informations shall be verified by oath."

It is a matter of common knowledge that there is a wide difference of opinion among the district judges and the bench, and the bar of the state generally, as to whether these provisions of the Constitution, above referred to, are self-executing, or whether they require legislation to become effective, and as to and whether or not felonies committed since statehood may be prosecuted by information as well as indictment, and whether under these provisions of the Constitution grand juries can only be convened upon order of a judge of a court having power to try and determine felonies upon his own motion, or upon a petition signed by 100 taxpayers of the county. Mindful of the fact that this case involves those fundamental rights over which the English-speaking people have waged their greatest battle for liberty, it is also well to remember that we have had a long session of the Legislature, whose greatest duty was to pass laws where needed to put the provisions of our Constitution in force, with a membership largely composed of ex-members of the constitutional convention, the personnel of which included many of the leading lawyers of the state. Yet no law was presented in relation to this subject. Under the well-settled rule that the constitutional provisions that are prohibitory are self-enforcing, the test being, can the provisions be enforced without the aid of legislation, the question arises, was the language of this provision (section 17 of the Bill of Rights [Bunn's Ed. § 26]) addressed to the courts or to the Legislature? We believe that it was addressed to the courts.

After a careful research, and a full consideration of all the authorities submitted, in connection with the provisions of our Constitution and laws, we are of the opinion that since the organization of the state (November 16, 1907) the prosecution of felonies by indictment and information have been, and are now, concurrent remedies. We are fully satisfied that the framers of our Constitution intended to abolish the grand jury system, except that it might be invoked for those special purposes, such as the investigation of public officers, the failure of public prosecutors to do their duty, and those peculiar conditions of public disorder which sometimes arise and make prosecutions by information impracticable. We also believe that it was intended that these provisions of the Constitution should become operative from the beginning of statehood.

They are sufficient to be self-executing under any and all accepted rules of construction, and, if there is any doubt about the proposition, it is settled by the rules of construction enunciated and quoted by our Supreme Court, in the case of *Ex parte Cain*, 20 Okla. 125, 93 Pac. 974, opinion of the court by Chief Justice Williams, wherein he says:

> "The rules of construction should be so applied to written constitutions as to give effect, if possible, to the intent of the framers, and of the people who have adopted it, and to promote the objects for which the same was framed and adopted. But it may be contended, if we adopt the literal words of this provision, that whilst it is stated that the same shall be immediately enforceable, yet we find no maximum punishment provided, and that consequently the same is not a complete criminal statute without such definite provisions, and that, therefore, it is not enforceable without additional legislation to give it effect. A statute providing a minimum without fixing the maximum punishment is neither invalid as being in violation of section 9, art. 2, of our

Constitution, nor as being too vague and indefinite to be enforced, at least as to the minimum punishment, which is valid without additional enactments. *State v. Fackler,* 91 Wis. 419, 64 N. W. 1029; *State v. Williams,* 77 Mo. 310. Hence it is not necessary, in considering as to whether or not said provision is self-executing, to determine as to whether or not punishment in excess of 30 days' imprisonment and $50 fine under said prohibition provision incorporated in our Constitution, without further legislation, could be imposed; for, having determined that said prohibitory provision prescribed an enforceable minimum punishment, we necessarily conclude that said provision, as it appears in said Constitution, is self-executing. Section 13 of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 275 [U. S. Comp. St. Supp. 1907, p. 149]) provides as follows: 'That said state, when admitted as aforesaid, shall constitute * * *; and that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof.' Also section 2 of the Schedule of the Constitution reads as follows: 'All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this Constitution and which are not locally inapplicable shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law.'"

And we are also upheld in our conclusion by the Supreme Court of the state of Missouri, in the case of *State v. Kyle,* 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 120. Section 12, art. 2, of the Constitution of the state of Missouri, which originally provided for the prosecution of felonies by indictment only, was amended by resolution of the Legislature, which, having been adopted by the vote of the people, took effect December, 1900, substituting the following in lieu of the former clause, to wit:

"No person shall be prosecuted criminally for felonies or misdemeanors otherwise than by indictment or information, which shall be concurrent remedies; but this shall not be construed to apply to cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

One of the questions before the court in that case was whether the amendment in question was self-executing or not.

Chief Justice Burgess, delivering the opinion of the court, says:

"Was the amendment in question self-operating from the time it took effect? It pertains to criminal procedure, and is prohibitory in character, and it is well settled that all such clauses in a Constitution are self-enforcing. *St. Joe Bd.. of Public Schools v. Patten,* 62 Mo. 444; *Householder v. Kansas City,* 83 Mo. 488; *Hickman v. Kansas,* 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684. There are a number of provisions in the Constitution of this state that are unquestionably self-executing, and require no legislation to put them in operation. The test in such cases is, Can the Constitution, as amended, be enforced without the aid of legislation? 'The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature. Does it indicate that it was intended as a present enactment, complete in itself as definite legislation? or does it contemplate subsequent legisation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and it is language addressed to the courts.' *Willis v. Mabon, sub nom. Willis v. St. Paul Sanitation Co.,* 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626. There is nothing in the language used in the amendment which indicates that subsequent legislation was necessary or intended to carry it into effect; nor was it, as it simply prohibits any other mode for the prosecution of felonies (except certain cases, as therein provided) otherwise than by indictment or information. The case ot *Fusz v. Spaunhorst,* 67 Mo. 256, is distinguishable from the one at bar, in that the section of the Constitution under which that case arose declared that it should be a crime, the nature and punishment of which shall be prescribed by law, clearly indicating that subsequent legislation was in the minds of the lawmakers necessary to carry it into effect, while no such intimation is to be found in the amendment in question, nor can it be inferred from the language used.

"The terms 'information' and 'indictment,' as used in the Constitution, have reference to and are to be understood in their common-law sense. *Ex parte Slater*, 72 Mo. 102; *State v. Kelm*, 79 Mo. 515. In the *Kelm Case* it was held that the term 'information,' as used in article 2, § 12, of the state Constitution of 1875, was to be understood in its common-law sense; that is, a criminal charge, which at common law is presented by the Attorney General, or, if that office is vacant, then by the Solicitor General of England, and in this state by the prosecuting attorneys of the respective counties who exercise the same powers as are exercised by the Attorney General or Solicitor General of England; that is, the power to present informations under their official oaths.

* * *

"As there was no statute in this state, at the time the constitutional amendment went into effect, prescribing the mode of procedure by information in the prosecution of felonies in the courts of record in this state, and as the information therein meant is to be understood in its common-law sense—that is, a criminal charge exhibited by the Attorney General or other proper officer—we must look to that law for light upon the subject. The common-law information was an accusation of a criminal character, exhibited against a person charging him or her with a criminal offense, by the Attorney General or the Solicitor General, and under his oath of office. Bishop says: 'The criminal information should be deemed to be such, and such only, as in England is presented by the Attorney or Solicitor General. This part of the English common law has plainly become ours. And as, with us, the powers which in England are exercised by the Attorney General and the Solicitor General are largely distributed among our district attorneys, whose office does not exist in England, they would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court.' 1 Bishop, New Crim. Proc. (4th Ed.) § 144."

In the case of *Davis v. Burke,* 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249, said case being where the petitioner, Davis, having been informed against by the county attorney of Cassia county, Idaho, was tried, convicted, and sentenced to be hanged, Mr. Justice Brown, delivering the opinion of the court, says the question is:

"First, whether the petitioner was legally prosecuted by information? The Constitution of Idaho contains the following clause: 'Art. 1 § 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate.' But we are also of opinion that for the purposes of this case the provision of the Idaho Constitution must be deemed self-executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (page 99): 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a Constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.' When a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is susceptible of execution. But where a Constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself. When a Constitution declares that felonies may be prosecuted by information after a commitment by a magistrate, we understand exactly what is meant, since informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the Constitution. It is true the Legislature may see fit to prescribe in detail the method of procedure, and the law enacted by it may turn out to be defective by reason of irregularity in its passage. In such case a proceeding by information might be impeached in the state court for such irregularity, but it certainly would not be void so long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law."

These authorities are conclusive that the provisions of our Constitution relating to prosecutions by information are self-enacting, self-operating, self-enforcing, and self-executing, and in this case we so hold.

It is next contended by counsel for petitioner that:

"Second. That the trial jury was not legally selected, drawn, summoned, and impaneled as required by law; and that, as petitioner was tried and convicted by a jury so illegally selected, said jury had no jurisdiction to sit as a trial jury and its verdict is wholly void."

We are of opinion that the manner and method of selecting the trial jury is not a question that can be reviewed in a *habeas corpus* proceeding. Section 2411, Gen. St. 1908, provides:

"Sec. 2411. When Not Discharged. No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following. * * * (2) Upon any process issued on any final judgment of a court of competent jurisdiction. * * * (4) Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information."

Many states have similar statutes providing that the prisoner shall not be discharged under a writ of *habeas corpus* where it appears that he is held in custody by virtue of a judgment of a court of competent jurisdiction, and appellate courts uniformly hold that the writ of *habeas corpus* is not to take the place of a writ of error or the appeal. *Ex parte Patman,* 20 Okla. 846, 95 Pac. 622; *Ex parte Johnson* (Okla. Cr. App.) *ante,* p—, 97 Pac. 1023; *In re Johnson* (Okla. Cr. App.) *ante,* p.—, 98 Pac. 461. Disobeying the law, or a failure to comply with the provisions of the law governing the selection of a petit jury, does not so affect the jurisdiction of the court as to justify the release by *habeas corpus* of a person convicted upon a trial had by a jury so illegally selected. It is unnecessary for us to consider whether the jury was properly or illegally impaneled, as it is a matter that does not go to the jurisdiction of the court.

The next and last proposition contended for by counsel for petitioner is: "Third. That the judgment is void, for the reason it is cruel, unjust, and excessive." As the question of punishment is for the Legislature to fix, the Criminal Code of Oklahoma provides:

"Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term of not less than any specified number of years, and no limit to the duration of such imprisonment, the court authorized to pronounce judgment upon such a conviction may, in its discretion sentence such offender to imprisonment during his natural life, or for any number of years not less than such as are prescribed."

Under section 2411, Gen. St. 1908, above quoted, a judgment by a district court, valid on its face, is an unanswerable return to a writ of *habeas corpus*, instituted for the release of a prisoner by virtue of such judgment. The court having fixed the maximum punishment permissible under the law, it is not for this court to review on a proceeding in *habeas corpus* the question as to whether or not the sentence imposed is cruel, excessive, and unjust, this being a question that could only be reviewed upon appeal. If the vice of the judgment and sentence relied on is that it is cruel, unjust, and excessive in character, as in this case, and not that it is of an entirely different character from that authorized by law, the writ will be denied and the prisoner remanded. Where an appeal or other direct method for the correction of errors in a judgment is provided for, as in our laws, that procedure must be followed.

Our conclusion is that the district court of Kingfisher county had jurisdiction under the information, as filed in this case, of the person and of the subject-matter of the prosecution, and said court did not, in the proceedings had, exceed its jurisdiction, and that irregularities, if any, occurring in the trial of the case, did not affect the validity of its final judgment. We are of opinion that the petitioner is not unlawfully restrained of his liberty, and that respondent, the sheriff of Kingfisher county, properly and legally holds said petitioner.

The writ of *habeas corpus* is therefore discharged, and the petitioner, George W. McNaught, is hereby remanded to the custody of the sheriff of said county, state of Oklahoma.

FURMAN, Presiding Judge, and BAKER, Judge, concur.

GEORGE ALDERMAN V. TERRITORY.

No. 1998, Okla. T. Opinion Filed January 13, 1909.

(98 Pac. 1026.)

1. **CRIMINAL LAW—Appeal—Sufficiency of Evidence.** To test the legality of a verdict in a case of larceny, where the jury has convicted a defendant upon the testimony of an accomplice, with independent evidence tending to connect the defendant with the commission of the offense, this court will take the strongest view of the corroborating evidence against the defendant that the evidence would warrant the jury in arriving at.

2. **SAME—Appeal—Accomplice Testimony.** Where a defendant is convicted on accomplice testimony, and the evidence is clear and direct, this court will not reverse the judgment of the lower court, unless it is able to say that the record does not contain any evidence, independent of the testimony of the accomplice, which tends to connect the defendant with the commission of the offense.

(Syllabus by the Court.)

Appeal from District Court, Kay County; B. T. Hainer, Judge.

George Alderman was convicted of larceny, and appeals. Affirmed.

At the March term of the district court of Kay county, 1906, an indictment was returned into court by the grand jury against George Alderman (hereafter called defendant) in which he was charged with grand larceny for taking two hogs, on or about the 28th day of January, 1906, from one C. H. Van Fassen. The defendant pleaded not guilty to this charge. On the 21st of April the jury found the defendant guilty, and he was sentenced by the court to four years' imprisonment in the territorial prison. Defendant filed a motion for a new trial. This being overruled, defendant brought this case by appeal to the Supreme Court of Oklahoma Territory. Upon the admission of the state of Oklahoma into the Union, this case, under the terms of the Constitution of the state and the Enabling Act was transferred to the Supreme Court of the state of Oklahoma (Act June 16, 1906, c. 3335, § 17, 34 Stat. 276). Upon the creation of the Criminal

Court of Appeals, as directed by statute, the Supreme Court of the state transferred the case to this court.

E. J. Dick and *Martin, Tibbetts & Guinn,* for appellant.

W. O. Cromwell, Atty. Gen., *Don C. Smith,* and *J. H. Cline,* for the Territory.

FURMAN, PRESIDING JUDGE (after stating the facts as above). The only question presented on this appeal is as to whether there is in the record any evidence tending to connect the defendant with the commission of the offense with which he was charged, and of which he was convicted, independent of the evidence of the two accomplices who testified against him on the trial.

In the case of *Fort v. State*, 52 Ark. 187, 11 S. W. 960, 20 Am. St. Rep. 163, that court said:

"To test the legality of a verdict under such circumstances, the rule of appellate courts is to take the strongest statement of the case against the defendant that the evidence would warrant the jury in finding, if the fact were specially found."

C. H. Van Fassen testified that he was a farmer, and lived in Miller township, Kay county, Okla.; that on the night of the 25th of January, 1906, two hogs were stolen from him. They were taken from a pen on his premises near the public road. The hogs were butchered in a pen, and dragged over the fence. There was so much travel in the public road that witness could not distinguish any particular tracks. The hogs weighed about 300 pounds each, and were worth about 5 cents a pound. They were taken without the consent of the witness.

Tom Saunders and Arthur Wainscott, two accomplices, testified that on the night of the 25th of January, 1906, the defendant went with them from Ponca City to the cemetery in a hack; that when they reached the cemetery, they drove inside and hitched the team; that their business was to get some hogs from a house south of the cemetery; that they did not get the hogs they expected to get, and then committed the theft for which defendant was upon trial. These witnesses gave a circumstantial account of the theft and the manner in which the stolen property was disposed of. Wainscott testified that the parties named went to the place where the theft of the hogs was committed, in a hack of his own, and drove a horse belonging to him and a mare owned by defendant. Defendant admitted having such a mare, but denied all participation in the theft, and also denied that his mare was driven by Wainscott on the night of the theft.

B. M. Knowles testified that, some week or two before the theft of Van Fassen's hogs, he saw the defendant and Wainscott in a barn on premises near the home of witness; that no one lived on the place on which the barn was situated; that witness, seeing the door of the barn open, went to shut it, and found the above-named parties there. Their team and buggy were in the barn. On being asked as to their business there, they replied that they were out hunting, but did not state what they were hunting for. The parties said that they had entered the barn to feed their team. They drove away. The deserted barn at which the witness saw the defendant and Wainscott was not in the immediate neighborhood of Van Fassen, but it was in the same county, and in the same end of the county. The entire circumstances were well calculated to arouse suspicion as to their purpose and business. Witness could not tell whether the parties had fed their team or not.

Section 5497, Wilson's Rev. & Ann. St. 1903, is as follows:

"(5497) 361. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

It will be seen that in order to warrant a conviction upon the testimony of an accomplice, it is not necessary for the corroborating evidence to connect the defendant with the offense. It is sufficient if it tends to do so.

This view was fully presented to the jury in the following instructions:

"(7) You are instructed that a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

The trial judge, and the jury doubtless placed the construction upon the testimony of Knowles that this defendant and Wainscott were then preparing to commit the offense of which defendant was found guilty, by hunting for, and locating, hogs to be afterwards stolen. While this evidence does not directly connect the defendant with the offense, yet this court cannot say that it does not have this tendency, and in view of the clear and direct testimony of the accomplices, we feel that the jury was authorized to convict the defendant. It is true that the defendant placed a number of witnesses on the stand to prove an alibi. The jury were properly instructed as to this defense. The jury saw all of the witnesses and heard their testimony, and were in a much better position to judge of their credibility than is this court. The trial judge also had a better opportunity than this court has to judge of these matters. The jury and the trial judge having found that there was corroborating evidence tending to connect the defendant with the commission of the offense, independent of that of the accomplices, this court cannot disturb the verdict of the jury and the judgment of the court, unless it can say that there is not in the record any testimony other than that of the accomplices which tends to connect the defendant with the commission of the offense. This we cannot say.

The judgment of the lower court is therefore in all things affirmed.

BAKER and DOYLE, JUDGES, concur.

J. M. BILTON V. TERRITORY.

No. 2156, Okla. T. Opinion Filed January 13, 1909.

(99 Pac. 163.)

1. **TRIAL—Separation of Jury.** Section 5519, Wilson's Rev. & Ann. St. 1903, requires that when the case is finally submitted to the jury, one or more officers must be sworn to keep them together until they have agreed upon a verdict and to return them into court when they have so agreed, or when ordered by the court. Held, that this section imperatively requires that upon the final submission of the case to the jury, they cannot be permitted to separate, and if permitted to separate, such separation vitiates the verdict, notwithstanding no affirmative evidence of prejudice is offered.

2. **NEW TRIAL—Misconduct of Juror—Use of Liquors.** The use of intoxicating liquor as a beverage by a juror during the trial and consideration of a capital case will vitiate a verdict of guilty, and entitle the accused to a new trial.

3. **HOMICIDE—"Dying Declarations"—Condition of Declarant.** In order to render dying declarations admissible, it must be shown that the declarant was not only in articulo mortis, but under the sense of impending death, without hope of recovery, at the time such declarations were made.

4. **SAME—Sense of Impending Death.** Contradictory statements as to expectations of impending death may prevent the admission of a statement as a dying declaration.

5. **CRIMINAL LAW—Appeal—Estoppel to Allege Error—Invited Error.** The accused will not be heard to complain that evidence offered in support of a dying declaration was heard by the court in the absence of the jury, when such absence was requested by the accused.

6. **HOMICIDE—Dying Declarations — Admissibility — Presumptions.** The court in a prosecution for homicide, in which dying declarations are sought to be introduced in evidence, will not presume in the absence of evidence that a man who has been injured, though seriously, must necessarily feel that he is about to die, and on such presumption admit his declaration.

7. **SAME—Sense of Impending Death.** It is error for the trial court to admit in evidence as a dying declaration a paper writing in the following words and figures: "Mr. P. A. Cox came from Cornish about 8 o'clock p. m. Saturday the 17th of June, 1905, walked out in front of the hotel and was talking to Miss Emma Martin, and telling her he was tired of this, and asked her to tell D. S. Huffman he wanted to drop this; about this time J. M. Bilton stepped out of his place of business and said he was tired of it too, and called him a son of a bitch, raised his sixshooter and fired, the ball striking me in the breast. I had no gun at all. I made no attempt to hurt him at all, but told him to go away and let me alone. I am of the opinion

I am not going to get well"—unless competent evidence independent of such declaration is offered in support thereof, showing that at the time said declaration was made the declarant had given up all hope of recovery.

8. **SAME — Admissibility — Credibility.** When dying declarations are offered in evidence, it becomes the duty of the trial court to first determine whether the declarant was in extremis, and whether he had lost all hope of recovery at the time the declaration was made; and, if such declaration is admitted as competent, it is then for the jury to pass upon its credibility.

9. **TRIAL—Instructions—Evidence "Evenly Balanced."** The accused in a murder case having put in evidence his general reputation as a peaceable, law-abiding citizen in the community where he resides, it is error for the trial court to instruct the jury that, if the evidence independent of the testimony in reference to character is found to be evenly balanced, then evidence of character would be sufficient to turn the scale in favor of the accused.

10. **CRIMINAL LAW—Evidence—Sufficiency.** In a criminal case, if the evidence is equally balanced, the accused is entitled to a verdict of acquittal.

11. **TRIAL—Argument of Counsel.** The trial court ought to confine counsel strictly within the facts of the case, and, if counsel persistently go outside of the record in their argument or statements to the jury, then the court should punish them; and, if they should obtain their verdict by this means, then the court should set such verdict aside.

12. **CRIMINAL LAW—Appeal—Presentation and Reservation of Grounds of Review—Objections—Argument of Counsel.** When the prosecuting attorney goes outside of the record and makes improper remarks, calculated to prejudice the rights of the accused, it is the duty of counsel of the accused to promptly interpose an objection to such remarks, and move the court to withdraw them from the consideration of the jury and instruct the jury not to consider such remarks. In this case, if this court believes that the remarks of the county attorney complained of materially aided in bringing about the verdict, we will set the verdict aside on account of such remarks.
(Syllabus by the Court.)

Error from District Court, Comanche County, Oklahoma Territory; F. E. Gillette, Judge.

J. M. Bilton was convicted of manslaughter in the first degree, and he brings error. Reversed.

On the 12th day of March, 1906, during the regular term of the district court of the county of Comanche, territory of Oklahoma, the grand jury duly found and returned into said court an indictment against J. M. Bilton, charging that on the 17th day of June, 1905, the said Bilton did kill and murder one P. A. Cox. The accused was arrested, arraigned, and pleaded not guilty. On the 23d day of October, 1906, he was put on his trial on said indictment, which resulted in his conviction of manslaughter in the first degree, and was, by said court, duly sentenced to serve a term of 10 years in the territorial prison at Lansing, Kan. It is from this verdict, and the judgment of the court thereon and the action of said court in refusing a new trial, that the accused appeals this case to this court.

Hudson & Key, *Bridges & Vertrees*, and *Stillwell H. Russell*, for plaintiff in error.—

On question of separation of jury: *State v. Nelson,* (Kan.) 70 Pac. 633; *McLain v. State,* 10 Yerger, 241, 31 Am. Dec. 573; *Commonwealth v. McCall,* 1 Va. Cas. 271; *Nomague v. People,* 12 Am. Dec. 157; *Peiffer v. Commonwealth,* 15 Pa. St. 468 ,53 Am. Dec. 605.

On question of jury's use of intoxicating liquor: *State v. Bullard,* 16 N. H. 139; *State v. Baldy,* 17 Iowa, 39; *People v. Douglass,* 4 Cowen 26, 15 Am. Dec. 332; *Jones v. State,* 13 Tex. 168; *Telham v. Page,* 6 Ark. 535; *Gregg v. McDaniel,* 4 Harr. (Del.) 367; *People v. Gray,* 61 Cal. 164; Proffatt on Jury Trial, 398.

On admissibility of dying declaration: Wharton on Homicide, p. 1003; *Whitaker v. State,* 79 Ga. p. 87, 3 S. E. 403; *Titus v. State,* 117 Ala. 16, 23 So. 77; *Smith v. Com.* 113 Ky. 19, 67 S. W. 32. 40 Am. St. Rp. 405; 2 Russ. Cr. 753; 1 Greenl. Ev., Sec. 123; 1 Phil. Ev. 289; *People v. Robinson,* 2 Park. Crim. Rep. 246; *Robbins v. State,* 8 Ohio St. 131, *Smith v. State,* 9 Humph, 9; *Woodcock's Case,* 1 Leach, 503; *People v. Hodgdon,* 55 Cal. 72, 36 Am. Rep. 30.

W. O. Cromwell, Thomas R Clift, Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for the Territory.—

On separation of the jury: Thompson & Merriam on Juries, page 370; *State v. Cucuel,* 31 N. J. L. 249; *State v. Bell,* 70 Mo. 633; *Crockett v. State,* 52 Wis. 211; *State v. Bowman,* 45 Iowa, 418; *State v. Conway,* 23 Minn. 291; *People v. Bonney,* 19 Cal. 426; *Marzen v. People,* 190 Ill. 81; *State v. Williams,* 149 Mo. 496; *Payne v. State,* 66 Ark. 545.

On use of intoxicants by jury: Thompson & Merriam on Juries, page 458; *Wood v. State,* 34 Ark. 341; *Pratt v. State,* 56 Ind. 179; *Davis v. People,* 19 Ill. 74; *Roman v. State,* 41 Wis. 312; *State v. West,* 69 Mo. 401; *Russell v. State,* 53 Wis. 367; *People v. Bemmerly,* 98 Cal. 299; *People v. Leary,* 105 Cal. 386; *Larimer v. Kelley,* 13 Kan. 78; *People v. Saisome,* 98 Cal. 235; *State v. Tatlow,* 23 Kan. 80; *Perry v. Barley,* 12 Kan. 537:

On admissibility of dying declaration: Wharton on Homicide, p. 1000; *Mattox v. U. S.* 146 U. S. 140; *People v. Dobbins,* 138 Cal. 694; *People v. Lem Deo,* 132 Cal. 199; *State v. Aldrich,* 50 Kan. 666; *State v. Furney,* 41 Kan. 115; *Archibald v. State,* 122 Ind. 122; *People v. Vernon,* 35 Cal. 49; *Hammil v. State,* 90 Ala. 576; *State v. Wilson,* 121 Mo. 434; *State v. Walton,* 92 Iowa, 455; *Stark v. State,* 137 Ala. 9; *Commonwealth v. Thompson,* 159 Mass. 56; *Newberry v. State,* 68 Ark. 355; *State v. Ah Lee,* 7 Or. 237.

BAKER, JUDGE (after stating the facts as above). The errors complained of by the accused, as shown by his petition in error herein, are as follows:

(1) Said court erred in overruling the motion of the accused for a new trial.

(2) Said court erred in overruling the motion of the accused for a new trial on the grounds of newly discovered evidence.

(3) Said court erred in admitting evidence offered on the part of the territory of Oklahoma.

(4) Said court erred in refusing and ruling out competent and legal evidence offered on the part of the accused.

(5) Said court misdirected the jury in matters of law.

(6) Said court erred in the decisions of questions of law arising during the course of the trial.

(7) Said court erred in admitting in evidence the purported "dying declaration" of the deceased, P. A. Cox.

(8) Said court erred in giving general instructions numbered 3, 11, 14, 18, 20, 24, and 27.

(9) Said court erred in refusing to give special instructions requested by accused, numbered 1, 2, 3, 4, 5, 6. 7, 8, 9, 10, 10½, 11. 12, 13, and 14.

(10) Said court erred in granting a continuance to the territory of Oklahoma.

(11) Said court erred in not withdrawing from the jury certain statements made by the county attorney.

(12) Said court committed other errors appearing in the record to the prejudice of the substantial rights of the accused.

Elaborate well-prepared briefs were filed on both sides, citing more than 200 cases, all of which were duly examined and carefully read by this court.

The first assignment of error, being predicated upon the overruling of the motion for a new trial, necessarily involves a consideration of all the grounds urged by the accused for a new trial in the court below. The motion for a new trial sets up, in substance, that the jury separated without leave of the court after retiring to deliberate on their verdict and before delivering the same into open court; that the jury was guilty of misconduct, by which a fair and due consideration of this case was prevented. From an examination of the evidence in support of the first and second grounds alleged for a new trial we find the affidavits of R. E. Dishman, T. A. Lewis, Alvin Campbell, and the accused. The substance of these affidavits is that, at different times during the introduction of testimony and the consideration of their verdict the jury was permitted without leave of the court to intermingle with the guests of the hotel at which the jury was being entertained, unattended at times by a sworn officer or bailiff, and at such times were in a position to hear any comments or statements that might have been made by other guests at said hotel; that the jury in a body, accompanied by a sworn officer, attended a public entertainment at the opera house, and were guilty of misconduct prejudicial to the rights of the accused by drinking whiskey in the washroom at the hotel and in a certain saloon. Eleven of the jurors who sat in this case were called by the territory, and they each testified upon the hearing of the motion for a new trial; the substance of their testimony being that the Juror Horton left the other jurors, unattended by a sworn officer, and went alone to a closet in the rear of the lot upon which the hotel at which the jury in this case were being entertained was located; that on their way from the hotel to the courthouse Jurors Thompson and Curtis left the remainder of the panel on the street and went into a saloon and drank whiskey; that Juror Nelson went to his office for his mail, but while doing so was near the bailiff in charge of said jury. The testimony of the jurors also shows that from necessity the jury was obliged to mingle to some extent promiscuously with the guests and frequenters of the hotel where said jury ate and slept, by reason of the smallness of the lobby, washroom and dining room of said hotel; also, that they sat about the stove in the lobby of said hotel, and intermingled with guests and others. The undisputed testimony shows that some three or four of the jurors drank whiskey out of a bottle in the washroom at the hotel, and two drank whiskey at a saloon during the time they were hearing this case and deliberating upon their verdict; also, that the jury attended a public entertainment at the opera house in a body, attended by a sworn officer.

The question, therefore, arises: Was the conduct of the jury such as to vitiate its verdict?

In an early and very instructive case upon this subject found in *Commonwealth v. John McCaul,* 1 Va. Cas. 271, McCaul was indicted on the charge of larceny. The evidence in said case shows that a juror separated from the jury against the wishes of the officer in charge, went to his hotel, ate his dinner, and, returning, resumed his place in the jury box, and another juror visited his sick child, the officer of the court accompanying remaining at the foot of the stairs, while the juror went up stairs to see his sick child and family. The trial resulted in a verdict of guilty. McCaul prosecuted error on the sole ground of the separation of the said jurors. Neither of the said jurors were separated more than 20 minutes. No evidence was offered to show that any one had talked to or attempted to tamper with or influence said jurors. The jurors themselves filed affidavits in which they stated that they had not talked with any one concerning the case on trial, and did not hear the case mentioned in any way. The "general court of Virginia" in this case held that notwithstanding the evidence conclusively showed that the jurors had not in any manner been tampered with, or influenced against the accused in this case, but by reason of their separation from the jury, said court held that it was harmful and prejudicial error, and a new trial was ordered.

It is not the opinion of the court in the case at bar that the jurors were tampered with, influenced, or prejudiced against the accused; but in our opinion it is an abuse of the discretion of the trial court in a capital case to permit the jury to be separated after they had been sworn to try the case, unless such separation is necessary and expressly permitted by the trial court. In any criminal case it is error to permit the jury to separate after the case has been submitted to them, and before they have reached a verdict. The object intended to be gained by preventing the separation of the jury is to safeguard in every possible way the purity of the stream of justice; to prevent it from in any manner being polluted by influences other than those which are produced by the legal evidence and the law governing the case. Such a course is both a protection to the interests of the state in bringing to justice one who may have committed a crime and safeguards the rights of the accused on trial for his life. It will be conceded by all interested in the administration of justice that one accused of crime is to be convicted or acquitted only upon the evidence given in his presence; that the minds of those who are to decide questions involving life and liberty are free from prejudgment; that in the course of the trial no impression ought to operate on their minds, except that which is derived from the testimony presented to them in open court and the law as given them in charge by the court; that the minds of the jurors shall be free from prejudice and bias, either for or against the prosecution or the accused before the trial begins, and shall continue impartial until they have delivered themselves of their verdict. This can be guarded only by preventing the separation of the jury, and the prudence and care of the trial court and the officers thereof. Such a course of procedure will free the minds of the public as well as the parties directly interested in the trial of the case from the slightest suspicion that the stream of justice is not in all respects pure and free from contamination. Absolute impartiality and fairness in the trial of criminal cases should be desired by all concerned. Preventing thte separation of the jury offers the best means to prevent undue and unlawful influences. To keep the jury from separating may at times be difficult of accomplishment, but the trial court should make proper provision therefor, and the rule against the separation of jurors in capital cases should in no manner be relaxed. We find some conflict in the decisions upon this subject. Many able courts differ with us. On the other hand, we find many well-considered cases supporting the rule herein laid down.

The Supreme Court of Tennessee in the case of *McLain v. State*, 10 Yerg. 241, 31 Am. Dec. 573, holds:

"Separation of the jury on trial of a criminal case, caused by absenting themselves of some of the jurors from the remainder of the jury, after it had retired from court for the night, for the space of fifteen or twenty minutes, without their being in charge of an officer, will vitiate the verdict of conviction in the case and entitle the prisoner to a new trial without its being required of him to show in addition to these facts that the jurors were, after their separation, tampered with."

The Pennsylvania Supreme Court in the case of *Peiffer v Commonwealth*, 15 Pa. 468, 53 Am. Dec. 605, holds:

"Separation of a jury in a capital case before they have been discharged is of substantial purport, and the disobedience thereof will invalidate the verdict. Separation of the jury on an indictment for murder after they have been impaneled and sworn, although with defendant's consent, invalidates their verdict, and the prisoner will be held to answer another indictment."

State v. Sherbourne, Dud. (Ga.) 28, and numerous cases therein cited; *Nomaque v. People,* Breese (Ill.) 145, 12 Am. Dec. 157; *People v. Douglass,* 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *State v. Baldy,* 17 Iowa, 39; *State v. Nelson,* 65 Kan. 689, 70 Pac. 633; *State v. Prescott,* 7 N. H. 287; *Williams v. State,* 45 Ala. 57; *Jumpertz v. People,* 21 Ill. 375; *People v. Thornton,* 74 Cal. 482, 16 Pac. 244. Most of the cases cited by the territory in this case on this subject hold that the separation of a jury for a short time will not vitiate a verdict, where the juror so separated from the others is attended by a sworn officer, and where the facts show affirmatively that no improper influence upon the minds of the jurors has taken place; but the great weight of authorities in capital cases favor the doctrine that, if the jury separates without being attended by a sworn officer such separation vitiates the verdict, notwithstanding no affirmative evidence of improper influence has been adduced. The mischief is found in the danger that might result from separation, and the great trouble in being able to prove the improper influence which might result from improper separation. The juror who was influenced will be loath to admit it, and those guilty of producing such influence will deny their guilt; and the accused is therefore left without a remedy to free himself from the results of an improper verdict.

This brings us to the remaining question affecting the conduct of the jury in this case, which is based upon the charge that some of the jurors during the trial drank intoxicating liquor. The evidence with respect to this charge is conclusive. Eleven of the jurors were called as witnesses on this subject. Seven of them testified that whiskey was drunk by some of the jurors from a bottle and at a saloon; and their evidence is uncontradicted. The higher courts have often been appealed to in cases involving this question; and while there is conflict of opinion, and the decisions quite equally divided, we think this is a proper time and a proper case in which to reflect the opinion of this court on this question. And, while we do not say the evidence in this case shows that a sufficient amount of liquor was drunk to affect the minds of any one of the jurors, we desire to express our disapproval of jurors drinking intoxicating liquor during the trial of a capital case. Every court, especially in the trial of a capital offense, should inquire whether, in the conduct of the jury, that prudence and circumspection has been observed which becomes them on such solemn occasion as that which commits to their hands the life of a fellow creature. We believe it will not be contended that the use of intoxicants by the jury during the performance of their duty will aid them in bringing about the furtherance of justice. No good results can be claimed for it, but much harm may result. It is the duty of thte trial court in the interest of the purity of its verdicts, and the rights of both the state and the accused, to have each verdict freed from any influence or consideration other than the evidence and the law; and juries or jurors should not be permitted while considering a criminal case to drink intoxicating liquors as a beverage, and, when the testimony shows that liquor was used as a beverage by the jury during its consideration of a capital case, such conduct of the jury should vitiate the verdict and entitle the accused to a new trial, regardless of affirmative proof of the effect the intoxicants had upon the mind of the juror.

The Supreme Court of Texas in *Jones v State,* 13 Tex. 168, 62 Am. Dec. 550, in an opinion handed down by Judge Lipscomb, says:

> "The drinking of ardent spirits [whiskey] of their own procurement after they had retired to consider of their verdict vitiates their verdict, and is good cause for a new trial."

The Supreme Court of New Hampshire in the case of *State v Bullard,* 16 N. H. 139, says:

"If in the trial of a criminal case spirits be furnished any of the jurors while deliberating on the verdict, such verdict, if against the prisoner, will be set aside."

The same court in the case of *Leighton v. Sargent,* 31 N. H. 119, 64 Am. Dec. 323, says:

"The use of brandy as a beverage by jurors while in the jury room after retiring to make up their verdict will furnish a sufficient cause for setting aside the verdict and granting a new trial, although the quantity drunk be small, and no suspicions are entertained by other jurors that the jurors who partook of it are under any influence from spirituous, liquors, and the liquor is furnished by the attending officer at the request of a juror complaining of illness."

In the *State of Iowa v. Baldy,* 17 Iowa, 39, the court says:

"When a juror after retiring to consider upon the verdict left the jury room in charge of the sheriff, and went to a grocery store where he procured and drunk a glass of ale or lager beer; after which he returned to the jury room and participated in finding the verdict, held, that the misconduct of the juror constituted sufficient ground to set the verdict aside and grant a new trial."

In the case of *People v. Douglass, supra,* Judge Woodworth, speaking for a majority of the court, said: "The mere drinking of spirituous liquors by the jurors is enough to set aside the verdict." *People v. Gray,* 61 Cal. 164, 44 Am. Rep. 549. The Supreme Court of Delaware in *Gregg v. McDaniel,* 4 Har. 367, a civil case, on motion after argument, set the verdict aside and granted a new trial on the ground that intoxicating liquor had been introduced into the jury room and used pending their deliberations, citing a number of cases.

The next assignment of error grows out of the admission in evidence of the alleged "dying declaration" of P. A. Cox, for the slaying of whom the accused is on trial, which is in the following words:

"Mr. P. A. Cox came from Cornish about 8 o'clock p. m. Saturday the 17th of June, 1905, walked out in front of the hotel and was talking to Miss Emma Martin, and telling her he was tired of this, and asked her to tell D. S. Huffman he wanted to drop this; and about this time J. M. Bilton stepped out of his place of business and said he was tired of it too, and called him a 'damn son of bitch,' raised his six-shooter and fired, the ball striking me in the breast. I had no gun at all. I made no attempt to hurt him at all, but told him to go away and let me alone. I am of the opinion I am not going to get well. T. R. Martin, Miss Emma Martin, Ernest Lester, Bill Morris, and W. C. Haywood were sitting in front of the hotel. P. A. Cox. Witnesses: T. R. Martin. J. W. Horn."

It will be observed by the reading of the paper writing offered as a "dying declaration" in this case that the declarant states: "I am of the opinion I am not going to get well." We are therefore led to inquire what is, in this connection, meant by the word "opinion." Sir Mathew Hale's definition of the word is:

"Opinion is when the assent of the understanding is so far gained by the evidence of probability that it rather inclines to one persuasion than to another, yet not without a mixture of uncertainty or doubt."

The evidence offered in support of the dying declaration herein does not show that the declarant intended to give the word "opinion," as used by him in this connection, a meaning different from that ordinarily given and understood. Hence the use of the word "opinion," as used in said dying declaration, is expressive of uncertainty and doubt, and produces in our minds the conviction that the declarant had not lost all hope of recovery. At the request of the accused, the court heard the testimony in support of the admissibility of the above quoted writing in the absence of the jury. To the admission of said paper as a "dying declaration" the accused excepted, and urges that the court erred in admitting the same. The question, therefore, presents itself to this court: Was the paper above quoted a "dying declaration"?

Wigmore, in his excellent work on Evidence (section 1438); says:

"All courts have agreed, with more or less difference of language, that the approach of death produces a state of mind in which the utterances of the dying person are to be taken as freed from all ordinary motives to misstate. The great dramatist expressed the common feeling long before it was sanctioned by judicial opinion. In the following passages will be found the now classical sentences of the earlier English judges, as well as the later ones pointing out clearly how the situation supplies a circumstantial guarantee of accuracy equivalent to that of the tests of oath and cross-examination."

The admissibility of dying declarations is based entirely upon the fact that they are made *in extremis,* when the person making them is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice. In other words, when the person making the declaration has lost all hope of recovery, he is in the same practical state as if called on in the court of justice under sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath.

Judge Ray, in the case of *Morgan v. State,* 31 Ind. 199 (referring to dying declarations), says:

> "As this class of evidence forms an exception to the general rule; as there can be no cross-examination of the declarant; as the accused cannot often meet his accuser face to face; and there must of necessity exist great danger of abuse—it must clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come."

In other words, to render a dying declaration admissible in evidence, it must have been made when the declarant was not only *in extremis,* but also had abandoned all hope of living. It will be observed that in the declaration in this case the language is used: "I am of the opinion I am not going to get well." The paper in this case alleged to be a dying declaration, and admitted in evidence as such in the court below, on its face is not a dying declaration. It appears from the declaration itself that the declarant had not abandoned all hope of recovery. Therefore the court below erred in the admission of said declaration in evidence. In this view we are supported by the well-established rule. But, in looking into the record in this case, we find the testimony taken in support of the alleged dying declaration discloses the fact that the declarant had been told that the bullet which afterwards caused his death had, in fact, not penetrated his body; that he was not told by his physician and surgeon that he was about to die. On the contrary, after the alleged declaration was made, he sent to Comanche for additional medical aid; thus showing that he had hope of recovery, and was not in *articulo mortis.*

The following authorities clearly sustain our view: 1 Greenl. on Ev. § 123; 1 Phil. Ev. 289; 2 Wig. on Ev., commencing at section 1430 on page 1798, and subsequent sections; *People v. Robinson,* 2 Parker Cr. R. (N. Y.) 246; *Robbins v. State,* 8 Ohio St. 131; Whar. on Hom. 1003; *Whitaker v. State,* 79 Ga. 87, 3 S. E. 403; *Titus v. State,* 117 Ala. 16, 23 S. E. 77; *Smith v. Commonwealth,* 113 Ky. 19, 67 S. W. 32; *State v. Johnson,* 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405; *State v. Medicott,* 9 Kan. 257; *State v. Knoll,* 69 Kan. 767, 77 Pac. 580; *State v. Draper,* 65 Mo. 335, 27 Am. Rep. 287; *Leiber v. Commonwealth,* 9 Bush (Ky.) 11; *Starr v. Commonwealth,* 97 Ky. 193, 30 S. W. 397; *State v. Shelton,* 47 N. C. 360, 64 Am. Dec. 587; *Nelson v. State, 7 Humph,* (Tenn.) 542; *Hackett v. People,* 54 Barb. (N. Y.) 370; *Reynolds v. State,* 68 Ala. 502; *State v.Baldwin,* 79 Iowa, 714, 45 N. W. 297; *Montgomery v. State,* 80 Ind. 338, 41 Am. Rep. 815; 10 A. & E. Enc. Law (2d Ed.) 376; *State v. Chambers,* 87 Mo. 406; *People v. Hodgdon,* 55 Cal. 72, 36 Am. Rep. 30.

The next assignment of error inviting our attention is the assignment predicated upon the court's refusal to grant a new trial on the grounds of newly discovered evidence. It appears from the record in this case that one J. W. Horn was a subscribing witness to the alleged "dying declaration." This fact was known to the accused before the trial. The accused by his counsel, as shown by the record, had called upon Horn several times, requesting him to make a statement to them concerning his knowledge of the physical condition of the declarant at the time of the making of the alleged dying declaration, and statements, if any, made by declarant at the time, but that, by reason of his friendship for declarant, and hostility toward the accused, said Horn refused to make any statement on the subject until after the accused was convicted, and then, for the first time, he made to counsel of the accused statements in the form of an affidavit filed in support of said motion. In his affidavit Horn says, in substance: That the reason he did not disclose the evidence set out in his affidavit before the trial was, because the deceased was his close personal friend, and that he was unfriendly to the accused, but notwithstanding he was many times approached by the counsel for the accused, and asked to state all he knew about the "dying declaration" and statements made by the declarant at the time the same was made; that he had replied each time that he knew nothing; that he was present at the bedside of the deceased when there was reduced to writing a statement called the "dying declaration" of Cox, and which statement was used by the prosecution in the trial of this case; that he signed said statement as a witness; that at the time the statement was drawn, and at the time it was signed by Cox, and by affiant as a witness, Cox made the following statement:

> "I do not believe that I am going to die. That 'son of a bitch' can't kill me, but I will sign anything that will help to break the 'son of a bitch's' neck in case I do die."

This affidavit stands in the record uncontradicted. The affidavits of counsel for the accused in support of the motion for a new trial on the grounds of newly discovered evidence show an unusual amount of diligence in attempting to secure the testimony of Horn at the trial of the accused; and show, further, that neither the accused nor his counsel knew of the facts set forth in Horn's affidavit until informed thereof by said Horn after the trial below. The newly discovered evidence is not cumulative; and, while it contradicts to some extent the alleged "dying declaration," it is in the opinion of this court very material, and might, if offered at the trial, have produced a different verdict.

Another assignment of error is predicated upon the charge of the court to the jury contained in instruction No. 27, at page 196 of the record, in which the court instructed the jury in the following words:

"The court instructs the jury that the defendant having put in evidence his general reputation as a peaceable, law abiding citizen in the community where he resides, such evidence is admissible under the law to be considered by the jury as a circumstance in this case, such evidence is permitted as bearing upon the question of defendant's guilt or innocence, upon the theory that a person who has heretofore always borne a good reputation as a peaceable citizen, and would not probably be guilty of the crime charged in the indictment herein. The court further instructs the jury that, if from all the evidence in this case they are satisfied beyond a reasonable doubt of the guilt of the defendant under the evidence and the instructions of the court, then it is your duty to find him guilty, notwithstanding the fact that heretofore, and at the time of the commission of the crime charged, the accused had borne a very good reputation as a peaceable citizen. If the evidence independent of the testimony in reference to good character is found to be evenly balanced, then the evidence of good character would be sufficient to turn the scale in his favor. The weight of such testimony, and the extent to which you will rely thereon, is a circumstance in this case, and what, if any, evidence in behalf of the prosecution is overcome thereby, is left wholly to your sound judgment in the consideration of all the evidence in the case."

This instruction was excepted to by the accused. The above quoted instruction is, in effect, this: That, if the jury found the evidence equally balanced, the defendant would not be entitled to a verdict of acquittal. This is not the law in criminal cases. If the evidence is equally balanced, the defendant as a matter of right is entitled to a verdict of acquittal, though his character and reputation may always have been as black as the hinges of Hades. The charge as given is clearly erroneous. We deem it unnecessary to cite authorities in support of our opinion respecting said charge.

Counsel for the accused in argument complained also that the court below heard the testimony offered in support of the competency of the alleged "dying declaration" in the absence of the jury, contending that the jury should have heard all the evidence offered on the trial of this case. The record, however, discloses that the accused requested that said evidence be taken in the absence of the jury. He therefore cannot now be heard to complain.

The accused complains of the conduct of the county attorney during the trial of this case in the court below, in this: That he made remarks prejudicial to the accused in both his opening statement and closing argument to the jury, which were not sustained by the record, We have read the record in this connection, and find that the remarks of the county attorney are clearly outside of the record, and should, therefore, not have been made. We cannot see, however, that the remarks were prejudicial to the accused. The trial court should have instructed the jury to have disregarded said remarks, which he probably would have done if he had been requested to do so by the accused. The record shows no such request, but shows that the accused objected and excepted to the same. The county attorney in the discharge of his duty should always be fair with the accused. No good purpose can be accomplished by any other course.

This court in the case of *Buck v. Territory of Oklahoma,* (decided at the present term of this court) *ante,* p.—, 98 Pac. 1017, held:

> "When the prosecuting attorney goes out of the record and makes improper remarks, calculated to prejudice the rights of the defendant, it is the duty of counsel for defense to promptly interpose an objection to such remarks and move the court to withdraw them from the consideration of the jury, and to instruct the jury not to consider such remarks. It is too late to interpose objections to improper remarks of the prosecuting attorney in his argument to the jury, after the argument has closed, unless the remarks were of such a character that their withdrawal from the consideration of the jury would not cure the error committed in their utterance."

Also in the case of *Vickers v. United States,* 98 Pac. 467, this court held:

"Where the language used by the assistant United States attorney in his opening statement is calculated to prejudice the accused, and proper objection is made and overruled by the court, and exception taken, the question will be reviewed by this court, but not otherwise. Where the assistant United States attorney in his argument to the jury went outside of the record, and appealed to the passions and prejudices of the jury, and objection was made and overruled, the strength of the testimony against the defendant will be considered, and, if the improper statements may have determined the verdict, a new trial will be granted."

It is the opinion of this court that for the various errors found herein the judgment of the court below should be, and the same is hereby, reversed, the cause remanded, and a new trial ordered.

FURMAN, PRESIDING JUDGE, and DOYLE. JUDGE., concur.

AL DOUGLAS v. TERRITORY.

No. 2155, Okla. T. Opinion Filed January 13, 1909.

(98 Pac. 1023.)

1. **INSTRUCTIONS—Oral Statements by Court.** Oral statements made by the court to the jury with reference to the form of their verdict, which do not contain directions or "instructions" upon some question of law involved in the trial, or comment on the evidence do not come within the statute requiring instructions to the jury to be reduced to writing unless waived by the defendant.

2. **INSTRUCTIONS—Reasonable Doubt.** The phrase "beyond a reasonable doubt," used in the statute in establishing the measure of proof necessary to warrant a conviction in a criminal case, is not a technical term, and needs no explanation from the courts in instructing juries. An instruction on this subject, in the language of the statute is all that the court is required to give. It is a dangerous thing for the courts to attempt to go further.

3. **APPEAL—Review—Assignments of Error—Homicide—Instructions.** (a) When counsel fail in their briefs to point wherein the defendant has

been injured by an instruction given, this court will not consider an assignment of error based upon such ground, unless the error is fundamental.

(b) It is the duty of the trial court to give instructions applicable to the testimony of a defendant, and based upon the hypothesis that it is true; and, when such an instruction is given, the defendant cannot be heard to complain.

(c) In this case the defendant was a peace officer. His testimony was to the effect that a difficulty was in progress when he commanded the deceased to drop his pistol, whereupon the deceased turned upon defendant, presented his pistol towards the defendant, and threatened to kill him, when the defendant fired the fatal shot. See opinion, for instructions properly given applicable to this testimony.

(Syllabus by the Court.)

Appeal from District Court, Comanche County; F. E. Gillette, Judge.

Al Douglas was convicted of manslaughter, and appeals. Affirmed.

On the 9th day of March, 1906, Al Douglas, hereinafter called defendant, was indicted by the grand jury of Comanche county for the offense of murder, alleged to have been committed on the 4th day of November, 1905. Defendant was arraigned, and pleaded not guilty. On the 19th day of October, 1906, the defendant was found guilty by the jury of manslaughter in the second degree. The defendant filed a motion for a new trial, which was overruled by the court, to which defendant excepted. The defendant was sentenced by the court to 27 months' imprisonment in the territorial prison at Lansing, Kan. The defendant brought the case by appeal to the Supreme Court of Oklahoma Territory. Upon the admission of Oklahoma to statehood, under the provisions of the enabling act and the Constitution, the case was transferred to the Supreme Court of Oklahoma. As directed by statute, the Supreme Court transferred the case to this court, upon its creation.

Al Jennings, Mc. Elhoes & Ferris, and *Hudson & Key,* for plaintiff in error.—

On question of supplementing written charge to jury with oral statements: Thompson on Trials, § 2375; *People v. Payne,* 8 Cal. 341; *Ray v. Wooters,* 19 Ill. 82; *Townsend v. Chapin*

(Ind.) 8 Black 328; *United States v. Ter. of Utah,* 104 U. S. 631; *Stone v. Cooper,* 45 Mo. 64; *Gile v. People,* 1 Colo. 60.

W. O. Cromwell, Atty. Gen., and *Thomas Clift,* Special Asst., for the Territory.—

On right of court to add oral statements to written charge: 11 Encyc. Pl. & Pr. 259; *Boggs v. United States,* 10 Okla. 424; *Potter v. State,* 15 Kan. 303; *Currin v. Clark,* 90 N. C. 355; *Bradley v. Waddell,* 96 Ind. 175; *Illinois Central Ry. Co. v. Wheeler,* 149 Ill. 525; *People v. Bonney,* 19 Cal. 427.

FURMAN, PRESIDING JUDGE. (after stating the facts as above). First. Defendant complains that the trial court gave oral instructions to the jury without the consent of the defendant or his counsel. The record shows that, after the conclusion of the argument in the case, the court handed to the jury the forms of verdict applicable to the issue in the case, and said to them:

"Gentlemen of the jury, the court hands you five forms of verdict, any one of which will be sufficient for your verdict in this case; but, if you find the defendant guilty of murder, you will write in your verdict whether the punishment shall be bv death or by life imprisonment at hard labor in the territorial penitentiary, as explained to you by the instructions."

We cannot agree with the contention of counsel that this language constituted any part of the instructions to the jury as to the principles of law applicable to the case. It did not attempt to modify, explain, add to, or take from the written instructions given to the jury. The following authorities, if any are needed, sustain this view of the question:

"Charging a jury is stating the precise principles of law applicable to the case immediately in question." (Bouvier's Law Dictionary.)

"In conclusion it may be stated that nothing short of a positive direction as to the law applicable to the case will be construed an instruction within the meaning of the statute." (11 Ency. Pl. & Prac. p. 259.)

"An exposition of the principles of law applicable to a case or some branch or phase of a case which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven," is the definition given by the Supreme Court of Indiana of what it takes to constitute an instruction. *Lehman v. Hawks et al.,* 121 Ind. 541, 23 N. E. 670.

"A direction to the jury to reject evidence as to the form of the verdict, or the like, is not an instruction within the meaning of the statute." (*Bradway v. Waddell,* 95 Ind. 175.)

"The mere fact that an oral ccommunication has passed from the court to the jury is not of itself proof that the statute has been disregarded. But the court may properly make oral statements to the jury in reference to the form of the verdict. the manner in which the trial has been conducted, the behavior of the jury, or counsel, or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." (*State v. Potter,* 15 Kan. 303.)

The Supreme Court of Oklahoma has passed upon the proposition here presented in the case of *Boggs v. United States,* 10 Okla. 424, 63 Pac. 969, 65 Pac. 927, wherein the jury were unable to agree upon a verdict, and upon order of the court were returned to the court room and a certain conversation had between the court and the jurors, portions of which the plaintiff in error, Boggs, claimed were oral instructions. The court said:

"It will be seen that in the remarks of the trial judge to the jury no independent proposition of law was given, no comment on the evidence was made, the whole tenor of the conversation was as to the form of the verdict the jury could return. The remarks of the court were all directed to the answer to the inquiry as to whether they could return a verdict different from the forms furnished, and was an explanation as to the form of verdict they might or ought to return. And as to all questions of law, he refers the jury to the written instructions previously given, with the remark, 'I think they are plain.' It is our duty to presume that the jury were men of reason and of ordinary intelligence, and that they were capable of understanding ordinary, plain English language; and, this being so, when the court said to them, 'If you read the instructions, I think they are plain,' it will not be presumed that they understood that the remarks were to be taken as a new or different statement of the law than that contained in the written charge, but they would certainly understand that he was referring them, for the law of the case, to the written instructions. We take the rule to be well settled that an oral direction to the jury as to the form or character of the verdict they may return is not such an instruction as is contemplated by the statute requiring all instructions to be in writing. * * *"

There was, therefore, no error in the action and ruling of the trial court in this matter.

Second. The court instructed the jury in the language of the statute upon the subject of reasonable doubt. The court went further, and attempted to explain the meaning of the words "reasonable doubt." To this there is no exception in the record. We will therefore not consider the explanatory instruction given. But counsel excepted upon the ground that it should have explained more fully what it took to constitute a reasonable doubt. In the case of *Wm. P. Price v. State,* (decided at the October term of this court) *ante,* p.—, 98 Pac. 447, it was held that it was a dangerous practice for courts to attempt to explain the meaning of the term "reasonable doubt," and that case was reversed partly on account of errors committed in such an attempt. All that a defendant has a right to demand upon this subject is an instruction in the language of the statute. The phrase "reasonable doubt" is not a technical term. It is generally understood in the common affairs of life, and needs no explanation from the court in instructing the jury. The court, having given the instruction directed by the statute, did not err in refusing to give the instruction requested by the defendant. For a full presentation of our views upon this subject, see *Price v. State, supra.*

Third. The defendant complains at the action of the trial court in refusing to give the following special instruction requested by defendant:

"Gentlemen of the jury, the court further instructs you: 'That the defendant has proven that he was a deputy city marshal of the town of Frederick, Okla., at the time he killed deceased, Stoneback. A deputy city marshal may, without warrant arrest one who commits a breach of the peace in his presence, or who by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit such breach, and such officer, acting under circumstances authorizing an arrest, may use all the force necessary in overcoming resistance and defending himself against violence from the person sought to be arrested; and, if in doing so he takes life, it is justifiable, being in pursuance of public justice.' The above instruction was asked by the defendant and refused by the court, because sufficiently covered in general instructions. Defendant excepts; exception allowed by the court. F. E. Gillette, Judge."

Counsel for the defendant in their brief, did not attempt to point out wherein the defendant was injured by the refusal of the court to give this instruction. This is a matter that must be made to appear to this court in counsel's brief, and upon their failure to do this, this court will not assume that the refusal to give the special instruction was prejudicial, unless the error committed is fundamental.

In the case of *Carter & Bro. v. Missouri Mineral Mining & Lumber Co.*, 6 Okla. 11, 41 Pac. 356, Judge Dale said:

"Counsel in their briefs fail to point out wherein the court below erred in the action taken. Therefore appellant's contention cannot be favorably considered on the record before us."

This announces a sound rule of law. We have repeatedly called attention to the necessity of a full presentation in the briefs of counsel of the grounds upon which they rely for a reversal. It is one thing to allege that an instruction is erroneous, and entirely another thing to point out the specific ground of the objection relied on. It is too much to expect that this court shall brief, as well as decide, cases. But, as our opinions have not yet been printed and generally circulated among the members of the bar, we will waive this matter, and go into the question fully.

The trial court instructed the jury as follows:

"You are instructed, gentlemen of the jury, that if you find from the evidence that at the time and place stated in the indictment the defendant was a peace officer in the city of Frederick in said county and territory, and was at the time deputized to act as such in said city, you are advised and instructed that as such officer he had a right to command the peace and to arrest without warrant any person in the act of committing a breach of the peace in his presence; and, if you further find from the evidence that the deceased was in the act of committing a breach of the peace, and the defendant was in the act of arresting him or commanding the peace, and as such officer used any language indicative of such purpose, and that the deceased thereupon made a violent demonstration towards the defendant of such character as to raise in the mind of a reasonably prudent man and officer that his own life was then in jeopardy by reason of the acts of the deceased, then such person or officer would thereupon be justified in using all the force necessary to overcome such threatened danger, even to the extent of taking life if such were to him apparently necessary, and it would be justifiable."

It will be seen that the instruction given substantially differs from that requested only in that it uses the language "and as such officer used any language indicative of such purpose, and that the deceased thereupon made a violent demonstration towards the defendant." etc. While there is no evidence in the record of malice on the part of the defendant toward the deceased, yet the testimony of the prosecution fairly presented the issue of an unnecessary and reckless killing. The testimony on the part of the defendant presented the issue of justifiable homicide, as stated in the instruction given. The defendant himself testified that before the shooting he repeatedly called on the deceased to drop his pistol. His exact language is, "I had been hollering to him to drop it. I told him two or three times to drop that gun, and he wheeled arund and had it up this way [indicating], and says, 'Damn you, I will shoot you!' and I shot him." The instruction was in strict compliance with the testimony of the defendant. The effect of his testimony was that he used language indicative of a purpose to command the peace, and that on account of this language the deceased turned upon him in a threatening manner, and that he then fired the fatal shot. This was a part of his case, and he cannot be heard to complain at the instruction which was given, as it was applicable to his own testimony. The jury were correctly instructed as to both issues in the case. They heard the evidence and saw the witnesses. They were in a much better condition to determine the truth of this matter than is this court. They rejected the testimony of the defendant and accepted that of the territory. This they had the right to do.

As there is ample evidence in the record to sustain the verdict of the jury, and as it appears that the defendant has been fairly tried, and found guilty, we are without the rightful power to disturb the verdict, and the judgment is therefore affirmed.

BAKER and DOYLE, JUDGES, concur.

WILLIE HARJO v. UNITED STATES.

No. 781, Ind. T. Opinion Filed January 13, 1909.

(98 Pac. 1021.)

1. **CONTEMPT—Misconduct in Summoning Talesmen.** If any officer, whose duty it shall be to summon a jury or to select and summon talesmen, when the regular panel of jurors has been exhausted, shall be guilty of unlawful, partial, or improper conduct in selecting or summoning such jurors or talesmen, he commits an act of gross contempt of court, and should be severely punished for such conduct.

2. **JURY—Summoning—Impartiality of Officer.** It is the duty of the officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence, courage, and good moral character, but in doing this he should act with entire impartiality between the prosecution and the defendant.

3. **TRIAL—Withdrawing Case from Jury—Misconduct of Officer.** When a motion is made, supported by affidavit, to withdraw a case from the consideration of, and to discharge, a jury, on account of improper action of the officer who selected and summoned the jury, or the talesmen, and such motion is made as soon as the facts stated therein come to the knowledge of the defendant or his counsel, and the matters of fact therein stated are not denied under oath, they will be taken as confessed, and will be construed most strongly against the prosecution and in favor of the defendant.

4. **JURY—Challenge to the Array.** A challenge to the array or panel will lie for bias, partiality, or irregular action of the summoning officer.

5. **APPEAL—Reversal.** When the record shows that a conviction has been fairly obtained, this court will not consider technical errors which do not affect the substantial rights of the defendant. But we will

not allow any judgment of conviction to stand when the record shows that unfair means were resorted to in order to obtain it.

(Syllabus by the Court.)

Appeal from the United States Court for the Western District of the Indian Territory; Louis Sulzbacher, Judge.

Willie Harjo was convicted of murder, and he appeals. Reversed.

On the 14th day of April, 1905, Willie Harjo, hereinafter called defendant, was indicted in the United States Court for the Western District of the Indian Territory, sitting at Wewoka, for the offense of murder. The defendant was arraigned and pleaded not guilty. The defendant was placed on trial on said indictment, and on the 11th day of April, 1906, was, by the jury found guilty of murder without capital punishment. Defendant filed a motion for a new trial, which, being overruled, defendant excepted. This case was carried by appeal to the United States Court of Appeals of the Indian Territory. Upon the admission of the state of Oklahoma into the Union under the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) and the Constitution, the case was transferred to the Supreme Court of Oklahoma, Upon the creation of the Criminal Court of Appeals, the case was transferred to this court as directed by the statute.

Crump & Rogers and *W. J. Crump,* for appellant.

William M. Mellette, for the United States.

FURMAN, PRESIDING JUDGE (after stating the facts as above). After two witnesses had been introduced on behalf of the prosecution, the defendant filed a motion, supported by affidavit, to withdraw the case from the jury, and that the jury be discharged from the further consideration of the case, upon the ground that, after the regular panel of jurors had been exhausted, the deputy marshal, who was ordered to summon talesmen to complete the panel, was guilty of improper conduct in summoning said talesmen, by discriminating against the defendant in refusing to summon men to serve as jurors who were acquainted with George Crump, one of the attorneys for the defendant. It appears from the record that before summoning a talesman, the deputy marshal would ask him if he was acquainted with George Crump, and then press the inquiry as to the extent of the acquaintance; and, if it appeared that the party interrogated was well acquainted with the said Crump, the deputy marshal would say, "That is all," and would pass on to other persons, without summoning such person as a talesman. It further appears that this motion was filed as soon as the information upon which it was based came to the knowledge of defendant and his counsel. There was no reply to, or denial of, the statements of fact contained in the motion and in the affidavit filed in support thereof. Here is a direct charge of improper conduct, and discrimination against the defendant, on the part of an officer of the court. This charge is supported by affidavit. If the charge was untrue, it was the duty of the prosecution to reply to it. Failing to do this, we are bound to consider the facts stated as confessed.

This case originated in that section of the state which then constituted Indian Territory. Section 1057, Carter's Ind. T. Ann. St. 1899, which was placed in force in that territory by act of Congress, is as follows:

> "Every person whose duty it shall be to select or summon jurors, in any court, or before any officer who shall be guilty of any unlawful, partial, or improper conduct, in selecting or summoning any juror, shall be deemed guilty of a misdemeanor and on conviction, shall be fined in any sum not less than one hundred dollars."

It will not be denied that it was improper, and clearly indicated partiality, for the officer who was charged with the duty of selecting and summoning the talesmen to attempt to exclude from the jury those who were acquainted with counsel for the defense. To tolerate such conduct would be to permit such an officer, charged with the duty of selecting and summoning talesmen, to amend the statute, and create a new ground for challenge for actual bias, viz., that of being acquainted with counsel for the defendant, while acquaintance with the prosecuting attorney would not be a disqualification. It is the duty of an officer selecting and summoning talesmen to use his best judgment in securing men of intelligence, courage, and good moral character. But in doing this he should act with entire impartiality. It was to secure this result that the statute above quoted was enacted. There being no denial of the motion and affidavit filed by the defendant, we are required to construe the statements there made most strongly against the officer, and in favor of the defendant. From this standpoint the officer was guilty of gross contempt of court, as well as a violation of a penal statute, and should have been required to make a satisfactory explanation, or have been severely dealt with. Courts cannot be too careful in rigidly suppressing everything which indicates the least bias or partiality in the selection, summoning, or taking care of jurors. Anything which gives the least odor of unfairness in the selection, summoning, or control of a jury will taint their verdict, and constitute a ground for reversal. Trial by jury means much more than a trial by 12 men. It not only means that the 12 men must possess the qualifications prescribed by law, but it also means that they must have been selected and summoned by impartial and disinterested officers.

The justice of this position is so manifest that it is not deemed necessary to cite many authorities in its support, but we will give a few.

"A challenge to the arary or panel will also lie for the bias, partiality, or irregular action of the summoning officer." (Ency. Pl. & Prac. vol. 12, p. 421, and authorities there cited.)

"It is essential to the fair and impartial administration of justice that the jury shall be selected and summoned by officers having no interest in the matters to be decided by them. An officer is not qualified to act in summoning a jury if he is interested in the event of the action, although not a party of record. When a jury is summoned by an officer who is disqualified for such reasons as are above stated, it is ground for challenge to the array." (24 Cyc. p. 226, and authorities there cited.)

The weight of authority goes even further than is stated in the above quotations, and holds that, if the officer who selects and summons the jury allows one who is interested in the case pending to suggest names or point out persons to be summoned, although the officer himself may not be otherwise objectionable, yet such conduct is ground for challenge to the array.

The motion to withdraw this case from the consideration of the jury, and discharge the jury was made at the earliest possible moment after the facts came to the knowledge of defendant and his counsel. It was therefore in time. It is the supreme purpose of this court to see that every person charged with crime shall receive, as near as possible, a fair trial. No trial which is not fair comes within the definition of "due process of law." When the record shows that a conviction has been fairly had, then this court will not consider technical errors which do not affect the substantial rights of the defendant. But we will not allow any judgment of conviction to stand when the record shows that unfair means were resorted to in order to obtain it. It is true that the defendant in this case is an ignorant Indian, who cannot speak or understand the English language. So much the greater reason why the trial court should have been vigilant in guarding his right to a fair trial.

There are other questions presented in this record, but we will confine our decision to the question presented alone, in order that we may emphasize the idea that trials must be fair, or convictions will not be sustained by this court. We are determined that every person in Oklahoma, regardless of race or nationality or social position or poverty, can rely upon the absolute fairness of the courts of the state.

For the error in overruling defendant's motion to withdraw this case from the consideration of, and to discharge, the jury, the judgment is reversed.

BAKER and DOYLE, JUDGES, concur.

Ex parte C. H. WATSON.

No. A53. Opinion Filed January 21, 1909.

(99 Pac. 161.)

1. **BAIL—Capital Offense—Illness.** On application to the Criminal Court of Appeals for bail by writ of habeas corpus after commitment for a capital offense by a justice of the peace, when it is made clearly to appear, by the testimony of competent, reputable physicians who have examined the physical condition of the prisoner at the time the application is made, that there is strong ground for the opinion that continued confinement would cause the disease from which the prisoner is then suffering to terminate fatally, he should be released on bail.

2. **SAME.** It is good cause for admitting to bail a prisoner confined to jail for a capital offense that such prisoner is then suffering with pneumonia and other ailments, caused by his imprisonment and likely to be aggravated by the continuance of such confinement, and that it will probably terminate fatally.

(Syllabus by the Court.)

Original petition by C. H. Watson for a writ of *habeas corpus* to be directed to A. S. Hamilton, sheriff of Bryan county. Petitioner admitted to bail.

The plaintiff alleges, in his amended petition for a writ of *habeas corpus,* substantially: That he is imprisoned and restrained of his liberty by the defendant, A. S. Hamilton, sheriff of Bryan county, Okla., in the county jail in the city of Durant; that he is not committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or order; that the cause or pretense of such confinement is that he has been charged with the crime of murder; that a preliminary examination was had before A. Neely, a justice of the peace in and for said county, and said justice of the peace, hearing the testimony introduced, committed the plaintiff to said jail without bond. The plaintiff further states that he is not guilty of any offense; that the evidence against him is not sufficient to show that the presumption of guilt is great, and that the proof of his guilt is not evident; that the proof in the case cannot show his guilt is evident, or the presumption of his guilt of the crime of murder great, and that his confinement in said jail is illegal; that he is charged with killing Wesley Crabtree; that the shooting was in his necessary self-defense; that the jail of said county is a very small structure; that there are no sanitary arrangments in said jail, and that the same is overcrowded with prisoners, and is poorly heated, lighted, and ventilated; that since his confinement in said jail everything that could be done for his comfort was done by the respondent and his jailer, but that by reason of the condition of said jail very little could be done for him; that he was incarcerated in said jail on the 24th day of August, 1908, and since his incarceration as aforesaid he has lost his health by reason of the conditions existing in said jail and his confinement therein, and has suffered from severe attacks of cramps, diarrhœa, and acute indigestion, brought on by reason of his confinement as aforesaid; that he has suffered much from malaria, and is now actually suffering from a severe attack of pneumonia, contracted since his confinement in said jail; and that he believes his physical ailments have been brought on by reason of his said confinement, and that if his confinement be continued in said jail for as much as 10 days or more a fatal result will ensue; that if he should be released from said jail his health would probably be restored. The affidavits of Dr. James Shuler, county physician of said county, Dr. J. B. Smith, Dr. G. M. Rushing, and Dr. A. S. Hagood were filed in support of plaintiff's petition; and at the time of the filing of the petition herein by the plaintiff there was no jurisdictional officer in said county who was authorized by law to grant a writ of *habeas corpus.*

The petition prays for a writ of *habeas corpus,* and that the defendant bring the plaintiff before this court in pursuance of the statute, to be dealt with as provided by law, and that, if it should be found by this court that the petitioner is not entitled to be released and discharged, the court make an order admitting him to bail.

On this petition a writ of *habeas corpus* was issued. For his return to the writ the defendant filed his answer in substance:

That the plaintiff is in his custody as such sheriff, is confined in said county jail of said county, and that he is confined and restrained in said jail by reason of a commitment issued by A. Neely, a justice of the peace of said county; that he holds the plaintiff as such prisoner by virtue of said writ of commitment issued by said justice of the peace as aforesaid; and that the defendant is now holding plaintiff as the duly qualified and acting sheriff of said county of Bryan, in the state of Oklahoma, under and by virtue of said commitment.

By agreement of counsel this case was heard in this court upon the record of the testimony introduced at the preliminary examination before said A. Neely, justice of the peace within and for the county of Bryan, state of Oklahoma; and by like agreement the presence of the plaintiff and defendant in this court is waived.

Utterback & Hayes and *C. E. McPherren*, for plaintiff.

Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for defendant.

BAKER, JUDGE (after stating the facts as above). The question before this court is: Is the plaintiff entitled to bail upon the testimony as shown by the transcript of the testimony adduced at the preliminary examination before said committing magistrate under section 8, art. 2 (Bunn's Ed. § 17), of the Bill of Rights of the state of Oklahoma? which reads:

"All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great."

The question involved in this case has been fully decided by the Supreme Court of this state in a well-considered case and able written opinion, written by Mr. Justice Kane, in the case of *In re Thomas,* 20 Okla. 167, 93 Pac., which we quote and approve, commencing at page 980. Said court held:

"Primarily a person charged with a capital offense cannot demand bail as a matter of right, since, upon ascertaining the character of the charge against the accused, the next question would be as to the degree of proof and the nature of the presumption of guilt. Upon an application to the Supreme Court for bail, by writ of *habeas corpus,* after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty—citing *Ex parte Hannock,* 78 Ala. 414; *Ex parte Rhear,* 77 Ala. 92; *Ex parte Vaughn,* 44 Ala. 417. On this question there is little conflict in the authorities. Alabama, California, Florida, Indiana, Nevada, New Jersey, New York, Utah, and Wyoming all support the proposition. Texas seems to be the only state placing the burden of proof upon the state to show that the offense is a capital one and that the proof is evident; but even there the doctrine of the text prevailed until it was upset in the case of *Ex parte Bud Newman,* 38 Tex. Cr. R. 164, 41 S. W. 628, 70 Am. St. Rep. 740. We believe that, with the burden of proof on the petitioners, if, after hearing the whole evidence introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused. But we do not wish to be understood as laying this down as a hard and fast rule, to which there may be no exceptions. There may be exceptional circumstances, such as the serious and probably fatal injury to health, or unusual and protracted delay upon the part of the state in bringing the prisoner to trial, that may warrant the court hearing all the evidence to admit to bail, when the proof of guilt is evident or the presumption thereof is great. The admission to bail, however, under these circumstances, is not a constitutional right, but a matter resting on the sound judicial discretion of the trial judge, who should not grant it save under extraordinary circumstances."

The undisputed proof in this case shows that the petitioner is now suffering with pneumonia and other ailments, and that by reason of bad condition of the county jail of Bryan county, it being poorly heated, lighted, and ventilated, and having no sanitary provisions or regulations, the continued confinement of the petitioner therein would endanger his health, and perhaps his life. While this court is expressing no opinion, and does not comment, upon the evidence respecting the guilt or innocence of the plaintiff of the crime charged against him, we will only say that, following the rule laid down in the case of *In re Thomas et al., supra,* and in the opinion of the case of *United States v. Jones,* 3 Wash. (C. C.) 224, Fed. Cas. No. 15,495, in which the court held: "Where an application for bail showed that the prisoner's health was bad, his complaint pulmonary, and that, in the opinion of his physician, confinement during the summer might so far increase his disorder as to render it ultimately dangerous, the court said: 'The humanity of our laws, not less than the feelings of the court, favor the liberation of a prisoner upon bail under such circumstances. It is not necessary, in our view of the subject, that the danger which may arise from his confinement should be either immediate or certain. If, in the opinion of a skillful physician, the nature of his disorder is such that the confinement must be injurious and may be fatal, we think he ought to be bailed.' Bail should not be granted on the ground of bad health, unless it be rendered probable by testimony that confinement has produced, or is likely to produce, fatal or serious results." *Ex parte Pattison,* 56 Miss. 161; *Lester v. State,* 33 Ga. 192; *U. S. v. Kie* (Alaska) 4 W. C. Rep. 553; *Ex parte Meador* (Tex. Cr. App. 1892) 20 S. W. 371; *Com. v. Semmes,* 11 Leigh (Va.) 666; *Archer's Case,* 6 Grat. (Va.) 705—that the right to give bail is herein granted the petitioner for the sole reason that he is now suffering from pneumonia and other physical ailments, and that his continued confinement in said jail will greatly injure his health and probably result in his death; and this court fixes the amount of bail herein at the sum of $10,000. which is fixed at the above-stated amount upon proof showing the plaintiff to be financially unable to furnish bail in a larger sum.

It is therefore ordered by this court that a mandate issue to the proper authorities of Bryan county, Okla., admitting plaintiff to bail in the sum aforesaid.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

JOHN CANNON v. TERRITORY.

No. 55. Opinion Filed January 29, 1909.

(99 Pac. 622.)

1. **INSTRUCTIONS—Homicide—Grade or Degree of Offense—Questions for Jury.** In a prosecution for murder, the court should submit the case to the jury for consideration upon every degree of homicide which the evidence in any reasonable view of it suggests; and, if the evidence tends to prove different degrees, the law of each degree which the evidence tends to prove should be submitted to the jury, whether it be requested on the part of the defendant or not. It is the duty of the court to say, as a matter of law, if there is any evidence that would tend to reduce the degree of the offense to manslaughter in the second degree.

2. **EVIDENCE—Character of Defendant—Weight and Effect of Evidence—Instructions.** The weight of the evidence tending to prove the good character of the defendant is for the jury, who, in arriving at their verdict should consider it the same as any other evidence in the case; and, where the court, in giving a general character instruction, adds: "And if after a careful consideration of all the evidence in the case, including that bearing upon his previous good character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him; but if, on the other hand, you believe from the evidence beyond a reasonable doubt that the defendant committed the crime in question, as charged in the indictment, it will be your sworn duty as jurors to find the defendant guilty, even though the evidence may satisfy your minds that the defendant previous to the commission of the alleged crime had sustained a good character for being a law-abiding and peaceable citizen."—**held** not misleading nor erroneous.

3. **INSTRUCTIONS—Reasonable Doubt.** It is not reversible error, in a prosecution for murder, to define reasonable doubt in a series of instructions, the definition as a whole being correct, rather than to embody the entire definition in one instruction; no prejudice from the practice appearing.

4. **WITNESSES—Cross-Examination to Discredit—Specific Acts.** A witness for the defendant may be cross-examined as to specific acts tending to discredit her, when such facts are relevant to the issue.

5. **TRIAL—Misconduct of Prosecuting Attorney—Improper Questions.** The defendant, in a murder case on appeal, cannot predicate error on misconduct of the prosecuting attorney in asking improper questions, where the court sustained the objections as made, and where no request was made to the court to instruct the jury not to consider the same.

(Syllabus by the Court.)

Error from District Court, Blaine County; M. C. Garber, Judge.

John Cannon was convicted of manslaughter in the first degree, and brought error to the Supreme Court of Oklahoma, whence the cause was transferred to the Criminal Court of Appeals. Affirmed.

John Cannon, plaintiff in error (hereinafter referred to as the defendant), was indicted in the district court of Garfield county, on December 15, 1906, charged with having murdered one Thomas A. Radford on January 10, 1906. The defendant was duly arraigned, and filed his motion to quash and set aside the indictment. On January 15, 1907, upon a hearing had, said motion was by the court overruled, and exception allowed. Whereupon the defendant filed his demurrer to the indictment, which demurrer was by the court overruled, and exception allowed. Thereupon the defendant refused to plead, and the court caused the plea of not guilty to be entered. Thereafter, on the 18th day of February, 1907, the defendant filed, in due form, his petition for a change of venue, upon the ground that a fair and impartial trial could not be had in Garfield county. Said petition coming on to be heard before the court on February 21, 1907, it was by the court ordered that the venue be changed to Blaine county, Okla. T., and directed the clerk of said court to make out, and within three days transmit to Blaine county, a certified order of removal, together with all the records and pleadings in said case, and ordered the removal of the defendant to the custody of the sheriff of Blaine county. Thereafter a trial was had in the district court of Blaine county, and on March 7, 1907, the jury in said case returned a verdict, finding the defendant guilty of manslaughter in the first degree. The defendant filed his motion for a new trial, which motion was by the court, on the 15th day of March, 1907, overruled, and exception allowed. Thereupon the court sentenced the defendant to imprisonment for a term of 40 years at hard labor in the territorial prison. To which judgment and sentence the defendant duly excepted. The defendant perfected an appeal to the Supreme Court of

Oklahoma, and the cause was transferred by the Supreme Court of Oklahoma to the Criminal Court of Appeals, as by law provided, and is now before this court for review.

H. J. Sturgis and *Guy S. Manatt,* for plaintiff in error.—

On refusal of court to charge on manslaughter in the second degree: *Lawson v. Territory* (Okla.) 56 Pac. 698; *Territory v. Nichols,* 2 Pac. 78.

On question of charge on good character: *State v. Van Kuran* (Utah) 69 Pac. 60; *Commonwealth v. Cleary,* 125 Penn. 64; *People v. Garbutt,* 17 Mich. 9.

On question of charge on reasonable doubt: Blashfield's Instructions to Juries, sec. 290; *Cowan v. State,* 22 Neb. 519; *Morgan v. State,* 48 Ohio St. 371; *Thomas v. State,* 126 Ala. 4; *Klyne v. State,* 78 Miss. 450.

On question of impeachment by proof of specific acts of wrong-doing: *Woodward v. State* (Texas) 58 S. W. 135; *Moulton v. State* (Ala.) 6 L. R. A. 301.

Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen. for the State.—

On question of failure to charge on manslaughter in second degree: Wharton on Homicide (3rd Edition Bowlby) pp. 241, 247; *Gardner v. State,* 90 Ga. 310.

On question of good character charge: Bishop's New Crim. Proc., § 1116; Sackett's Instructions to Juries (2nd Ed. Newell) pp. 652, 653.

Latitude of cross-examination to impeach witness: 7 Ency. of Ev. 171, 175; *Shepard v. Parker,* 36 N. Y. 577; *State v. Coella,* 3 Wash. 99; *State v. Hill,* 52 W. Va. 296; *State v. Abbott,* 65 Kan. 139; *Sage v. State,* 127 Ind. 15; *Brittain v. State* (Texas) 85 S. W. 278; *People v. Webster,* 139 N. Y. 73; *State v. Hack,* 118 Mo. 92; *Lewis v. Steiger,* 68 Cal. 200; *Georgia v. Lybrand,* 99 Ga. 421.

DOYLE, JUDGE, (after stating the facts as above). The record of the proceedings in the trial court is voluminous, consisting of over 900 pages without an index. We have, however, carefully examined the entire record, together with the several assignments of error, which counsel for the defendant, in their brief and argument, group into three assignments, which we will now consider, and state our conclusions thereon in the order named and argued in the defendant's brief.

The first assignment is "error of the court in its instructions to the jury." The court instructed the jury as to the indictment and the plea entered, and defined the terms, "homicide," "murder," and "manslaughter in the first degree"; also what constituted excusable and justifiable homicide, but refused to define manslaughter in the second degree, and refused to give the following instruction requested by the defendant, the same being instruction No. 54:

> "Instruction No. 54. The jury are instructed that every killing of one human being, by the act, procurement, or culpable negligence of another, which, as defined in these instructions, is not murder, nor manslaughter in the first degree, nor excusable or justifiable homicide, is manslaughter in the second degree. (Offered by defendant, refused, and excepted to. M. C. Garber, Judge.)"

Counsel for the defendant earnestly argue that the refusal to give this instruction is clearly erroneous, and sufficient to reverse the judgment, and quote section 5490, Wilson's Rev. & Ann. St. 1903, which reads:

> "(5490) 354. When it appears that a defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

Also section 5487, Wilson's Rev. & Ann. St. 1903, which reads:

> "(5487) 351. On the trial of an indictment, questions of law are to be decided by the court, and the questions of fact are to be decided by the jury; and although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive the law which is laid down as such by the court."

And in support of this contention they cite the case of *Lawson v. Territory of Oklahoma*, 8 Okla. 1, 56 Pac 698, and the cases therein cited. This case, we believe, is clearly distinguished from the case at bar. In that case the court instructed the jury as follows:

"You are instructed that in this case there is no evidence to support or justify a verdict of manslaughtr in the first degree, manslaughter in the second degree, or excusable homicide; and, under the evidence in this case, I instruct you, as a matter of law, that your verdict must be that the defendant is guilty of the crime of murder, as charged in this indictment, or that the killing of deceased by the defendant amounted in law to justifiable homicide, as in these instructions defined, and that the defendant is not guilty."

This instruction so given was duly excepted to, and assigned as error, and was by the Supreme Court of the Territory of Oklahoma held to be reversible error. Justice Burwell, expressing the opinion of the court, in part, says:

"The trial court seems to have proceeded upon the theory that, if the homicide was proved beyond a reasonable doubt to have been committed by the defendant, it was the duty of the defendant to introduce evidence to show that it was only manslaughter. This is true in this territory by virtue of our statutes. Section 5515, Wilson's Rev. & Ann. St. 1903, provides: '(5515) 379. Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.' As to whether or not a court can, in a case where there is no evidence tending to reduce the killing below murder, instruct the jury that they should either find the defendant guilty or acquit him is not presented in this case, and we will not determine that question; but, inasmuch as there was some evidence tending to reduce the killing below murder, we think that the instruction given by the trial judge, directing the jury to find the defendant guilty of murder or acquit him, was incorrect."

Thus we see the case relied on by counsel does not, in any way, support their contention. The only material question is, Does the evidence in the case show, or tend to show, any of the elements or ingredients of manslaughter in the second degree?

A careful examination of the entire record discloses that there was no such evidence offered. The testimony introduced on the part of the territory proved, or tended to prove, a case of deliberate, premeditated, cold-blooded murder.

The testimony of several witnesses who were eyewitnesses of the tragedy is, in substance, as follows: The deceased, Thomas A. Radford, who was city marshal of Enid, was standing, warming his hands by a radiator in the Tony Faust Saloon, having his gloves on and his overcoat buttoned up. The defendant stepped up to him, and without a word of warning, shot him in the breast, whereupon the deceased turned and ran out of the door onto the sidewalk. The defendant, pursuing the deceased, shot him again in the back as he was passing through the door, then, overtaking him some distance from the door, grabbed him by the arm, and shot him in the temple. The deceased falling from the sidewalk into the street in a dying condition, the defendant attempted to again shoot him in the head, when a bystander interfered and took his revolver from him. There is no conflict in the testimony concerning the tragedy after the firing of the first shot. The testimony further shows that the defendant had several times previously threatened to take the life of the deceased.

The defendant has attempted to justify the killing on the ground of self defense. Testimony was introduced, proving or tending to prove, that the deceased, Thomas A. Radford, had several times, on different occasions, threatened to take the life of the defendant; and the defendant, testifying, stated that the deceased moved his hands as though he was trying to get his gun, before he (defendant) fired the first shot. An abortive attempt was also made to invoke the unwritten law, more as a matter of extenuation, or in mitigation of the offense, than as a defense.

In cases of this kind we believe it is the duty of the court to say, as a matter of law, if there is any evidence that would tend to reduce the grade of the offense to manslaughter in the second degree. Assuming the facts to be as claimed by the defendant in this regard, and as shown by the testimony offered on his behalf, we believe the court properly held that there was no testimony tending in any way to reduce the grade of the offense to manslaughter in the second degree. This court, in the case of *Vickers v. United States, ante,* p.—, 98 Pac. 467, stated the rule in capital cases as follows:

> "Whenever the evidence warrants it, the duty of the court is to instruct the jury upon the other offenses included in the crime charged."

In the case at bar counsel do not claim that there is any evidence that tends to reduce the offense charged to manslaughter in the second degree. They argue that under the provisions of our statute it is the duty of the trial court to instruct the jury in relation to all the degrees of the crime of murder, as charged in the indictment, and that it is for the jury alone, in passing upon the weight and credibility of the testimony, to say whether the facts in evidence do or do not constitute manslaughter in the second degree.

In the case of *Territory v. Nichols,* 3 N. M. 103, 2 Pac. 78, cited by counsel in support of their contention, the court quotes the rule as stated in Bishop's Criminal Procedure, § 980, and approves the same. It is as follows:

> "The charge should state the law in its application to the facts as already explained, clearly and fully. If, for example, there are different degrees of an offense, the law of each degree which the evidence tends to prove should be given, but not of any degree which it does not tend to prove."

In that case the court only quoted the law applicable to murder in the first and second degrees, and the court held the instructions erroneous because there was evidence tending to show that the crime was murder in the fourth degree.

Mr. Wharton says:

> "The province of the court, on an issue as to the degrees of a homicide, is to guide and direct the jury, and keep them within proper bounds. It is its duty to determine whether competent evidence has been introduced, which, if believed by the

jury, would furnish the elements or ingredients of any particular grade of homicide." (Wharton on Homicide [3d Ed.] p. 241, citing *Com. v. Morrison*, 193 Pa. 613, 44 Atl. 913, and *State v. Ellis*, 74 Mo. 207.)

"And it is for the court to decide what grade or grades of homicide the evidence tends to establish, and it should confine itself, in instructing the jury, to such grade or grades"—citing *State v. Estep*, 44 Kan. 572, 24 Pac. 986, *State v. Ryno*, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303, and *Gardner v. State*, 90 Ga. 310, 70 S. E. 86, 35 Am. St. Rep. 202.

We believe the court rightfully ruled in refusing to give the instruction requested.

It is also argued that the court below erred in instructing the jury on the law of character evidence. The court instructed the jury as follows:

"Instruction No. 27. In this case the defendant has introduced evidence to show his previous good character for being a law-abiding, peaceable citizen, and you are instructed that such evidence is competent in favor of the defendant, as tending to prove that he would not be likely to commit the crime alleged against him, and if you believe from the evidence that prior to the commission of the alleged crime the defendant had always borne a good character for being a peaceable and law-abiding citizen among his acquaintances, and in the neighborhood where he lived, then this is a fact proper to be considered by the jury, with all the other evidence in the case in determining the question of whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or truthfully, and if, after a careful consideration of all the evidence in the case, including that bearing upon his previous good character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him; but if, on the other hand, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the indictment, it will be your sworn duty as jurors to find the defendant guilty, even though the evidence may satisfy your minds that the defendant, previous to the commission of the alleged crime, had sustained a good character for being a law-abiding and peaceable citizen"—to which instruction defendant duly excepted.

The defendant requested the following instruction, being instruction No. 45:

"Instruction No. 45. The court instructs you that evidence of previous good character is competent evidence in favor of the defendant, as tending to show that he would not be likely to commit the crime charged against him, and, if the jury believe from the evidence that, prior to the charge in this case, the defendant has always borne a good character, as a peaceable, orderly man in the community where he lived, then it is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminate him are mistaken or have testified falsely or truthfully; and if, after a careful consideration of all the evidence in the case, including that bearing upon previous good character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. (Offered by defendant and refused; exceptions. M. C. Garber, Judge.)"

We believe the court rightfully rejected, and properly refused to give, the foregoing instruction as requested. The instruction as given by the court is possibly subject to criticism, but under the proof in the case, and no sufficient instruction having been offered, we do not believe counsel's contention that the aforesaid instruction No. 27 is erroneous and misleading is well founded.

Counsel cite, and seem to rely upon, the Utah case of *State v. Van Kuran*, 25 Utah, 8, 69 Pac. 60. In that case the defendant was prosecuted for embezzlement. The proof was wholly circumstantial, and related to various entries in the books of defendant as treasurer of the corporation, to which others also had access. Bartch, Judge, rendering the opinion of the court, in part, says:

"Considering this with the previous instructions limiting the effect of the proof relating to good character, it was calculated to lead the jury to infer that, if from the criminating evidence they believed the prisoner guilty, they must discard the evidence of good character. The instructions must be regarded as misleading and erroneous, for the accused had the right to have such testimony considered, in determining the question of his guilt or innocence, the same as any other evidence in the case. So the accused had the right to have the jury charged that in determining whether or not he was guilty, as charged in the information, beyond a reasonable doubt, his good character, so far as involved, if proven, should be considered and weighed the same as any other fact established, and that in itself might not only create a reasonable doubt of guilt, which might not otherwise be established, but might carry conviction of innocence."

In the case at bar a large part of the character evidence offered related to a time remote from the killing. That offered, covering a period of several years that defendant lived in Garfield county, consisted of the testimony of persons interested in the defendant's defense, and a paradoxical proposition was presented by the fact that several of the character witnesses were persons who testified on the defendant's behalf in securing a change of venue from Garfield county, on the ground that the minds of the people of Garfield county were so prejudiced against the defendant that he could not have a fair and impartial trial therein.

Mr. Bishop states the rule to be as follows:

"The weight of the evidence tending to prove the good character of the defendant is for the jury, who in arriving at their verdict should consider it, not as something detached from the proof, but in combination with it all. Consistently herewith the court may, and commonly does, make to them pertinent observations varying with the case, as that a good character can have little practical effect against direct and otherwise satisfactory proofs; cannot turn the scale against conclusive evidence of guilt; will not justify a verdict of not guilty if the jury are convinced of guilt beyond a reasonable doubt." (Bishop's New Crim. Proc. § 1116.

Measuring the instructions complained of by the foregoing rule, it cannot be said that the defendant could have been prejudiced thereby under the facts in this case. The instruction states that evidence of previous good character of the defendant is competent, for the separate and distinct purpose therein stated, to prove, or as tending to prove, that he would not be likely to commit the crime alleged against him, and to assist the jury in ascertaining whether the witnesses on the part of the territory had been mistaken, or had testified truthfully or falsely. In view of the convincing character of the testimony presented by the prosecution against the defendant, we do not think we would be justified in holding that the instruction, as given, was misleading and erroneous to the extent of being prejudicial to the rights of the defendant.

It is also contended that the court erred in giving the instructions defining "reasonable doubt." The court gave three distinct instructions defining reasonable doubt, being Nos. 28, 29, and 30. Counsel admit that No. 28 is a correct instruction, but argue that the effect of it is destroyed by instruction No. 30. The instructions read as follows:

"No. 28. A reasonable doubt is that state of the case which, after a full, fair, and impartial comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty, of the truth of the charge; that is to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

"No. 29. The jury are instructed that it is not their duty to go outside of the evidence to hunt up doubts nor to entertain such doubts as are merely chimerical and conjectural. A doubt to justify an acquittal, must be reasonable, and it must arise from the evidence, or lack of evidence, in the case. If after a careful and candid consideration of all the evidence in the case, the jury can say, on their oaths as jurors, and on their conscience as men, that they have an abiding faith of the truth of the charge as contained in the indictment, amounting to a moral certainty, then they are convinced beyond a reasonable doubt. (Defendant excepts. B. B. and B. & D., Attys. for Def.)

"No. 30. If after a careful comparison and candid consideration of all the evidence in the case, you have a doubt of the defendant's guilt, it will be your duty to determine whether such doubt is reasonable and sufficient in law to acquit the defendant. And, if after applying the law defining such doubts, as laid down in these instructions, you find that the doubt in question is not a reasonable one, then it will not be sufficient in law to acquit the defendant. A doubt, to justify an acquittal, must be a reasonable one, and it must arise from a careful and candid investigation of all the evidence in the case; and unless the doubt is a reasonable one, and does so arise, it will not be sufficient in law to authorize a verdict of not guilty. (Defendant excepts. B. B. and B. & D., Attys. for Def.)"

And, while we believe that the foregoing instructions on the subject of reasonable doubt were clear, impartial, comprehensive, and free from substantial error, we think that the correct rule has been enunciated by this court, in the case of *Price v. Territory, ante,* p.—, 98 Pac. 447, wherein it was held that it is a dangerous practice for courts to attempt to explain the meaning of the term "reasonable doubt," and also in the case of *Douglas v. Territory,* decided at this term, *ante,* p.—, 98 Pac. 1023, wherein this court, in the syllabus, says:

"The phrase 'beyond a reasonable doubt,' used in the statute in establishing the measure of proof necessary to warrant a conviction in a criminal case, is not a technical term, and needs no explanation from the courts in instructing juries. An instruction on this subject in the language of the statute is all that the court is required to give. It is a dangerous thing for the courts to attempt to go further."

Mr. Blashfield, in his excellent work on Instructions to Juries, § 290, says:

"Definitions of 'reasonable doubt' should not be risked in criminal trials, and the juror should be allowed to have his own conception of what a 'reasonable doubt' is to him, not to the prosecutor or the court; and he should not be under any legal compulsion to have, or be able to formulate and state, a reason which may raise a reasonable doubt in his mind or conscience."

This, we believe to be the correct rule; and, in the case at bar, while the trial court added the explanatory instructions, he correctly stated the law, and we cannot believe that the defendant was prejudiced thereby.

No other assignments of error are urged by defendant's counsel, based on the giving of, or refusal to give, instructions.

However, we have carefully considered all the instructions as given, and our conclusion is that the court has therein fully, fairly, and correctly stated the law of the case.

Second. "Errors of the court, during the progress of the trial, in the admission of testimony offered by the prosecution and the exclusion of testimony offered by the defendant." Under this assignment counsel for the defendant contends that the trial court erred in permitting the prosecution to cross-examine certain witnesses for the defendant on matters going to the question of the chastity and moral character of the wife of the defendant and the witness May Baser, and in their brief, without citing any authorities, conclude by saying:

> "Apparently the court permitted this testimony to be introduced for the purpose of aiding the jury in arriving at the character of the house kept by the defendant and his wife. If this was the purpose, it was wholly incompetent."

We think that the cross-examination was properly permitted. The proof on behalf of the prosecution tends to show that the motive for the killing was malice, resentment, and revenge because the deceased, in his official capacity as city marshal, had sought to suppress and prevent the defendant and his wife from conducting a rooming house in the city of Enid, which the proof shows to have been a place of ill repute, to say the least. In doing this the deceased was carrying out the express instructions of the mayor and council of said city.

The defendant sought to show by the testimony of his wife that the deceased, who was a married man living with his wife and six children, becoming acquainted with the witness shortly after his election as city marshal, continuously made indecent and improper proposals to her, both before and after her marriage to the defendant (which occurred in the month of August prior to the homicide), and that this conduct on the part of the deceased continued up to a short time before his death. The defendant's wife also testified that the other peace officers, who were witnesses for the territory in the case, were guilty of similar misconduct towards her. All of this testimony was admitted over the objection of the prosecution. The testimony presented by the record shows that the defendant up to about eight months prior to the homicide, was the jailer in charge of the Garfield county jail; that, becoming acquainted with the witness while she was incarcerated in said jail, by reason of his misconduct with her, was discharged. He then took up his abode at the rooming house of the witness marrying her in the month of August preceding the homicide; that on one occasion the deceased and the sheriff of Garfield county, being called to witness' rooming house by reason of the death, by shooting of a man there, they found the body in or near the door of the room occupied by the witness May Baser. The defendant then and there assaulted the deceased, this being a few months prior to his killing deceased. All of this testimony was properly admitted, as these facts were so closely connected and interwoven with the final tragedy as to form a chain of facts tending to explain a motive, and to disprove facts sought to be proven by the defense.

It is an axiom of law of evidence that all facts having rational probative value are admissible unless some specific rule forbids. In the case of *Austin v. State,* 14 Ark. 555, Scott, J., says:

"It is certainly true, as a general rule, both in civil and criminal cases, that the evidence must be confined to the point in issue; and in criminal cases there is, perhaps, a greater necessity, if possible, than in civil proceedings to enforce the rule. But in neither class of cases does this rule exclude all evidence that does not bear directly upon the issue. On the trial all evidence is admissible which tends to prove it, and no facts are forbidden to be shown except such as are incapable of affording any reasonable presumption or inference in elucidation of the matters involved in the issue."

"The fact that the incidental effect of the cross-examination is to degrade the witness examined does not render it improper. The fact that witness may refuse to answer the questions on the ground that it incriminates him is no sufficient objection. Nor does the fact that a cross-question put to a witness as to particular acts of misconduct may tend also to impeach another witness in an unauthorized manner render it any the less proper." (Ency. of Ev. vol. 7, p. 179.)

"Any act on a witness' part in connection with the subject-matter or trial of the cause may be proved to impeach him, by a party entitled to do so." (*Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884; *Georgia v. Lybrend,* 99 Ga. 421, 27 S. E. 794.)

In the case of *State v. Coella,* 3 Wash. 99, 28 Pac. 28, the court used this language:

"If she chose to answer, and admit that she had wantonly violated the restraints and passed outside the limits which religion, society, and the law have long established for woman's welfare and protection, her testimony would have been seriously impaired. She could not have ruthlessly destroyed that quality upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched."

"A witness may be asked on cross-examination whether she did not keep girls for the purpose of prostitution." (*State v. Hack*, 118 Mo. 92, 23 S. W. 1089.)

It was competent for the prosecution to cross-examine the witness as to her antecedents, vocation, character, and past conduct. and thus impair her credibility. This line of inquiry became important because, the court having permitted the witness to testify as to the conduct of the deceased towards her, all of the circumstances surrounding the case justified a full cross-examination as to her past conduct and character, and as to the past conduct and character of the witness May Baser, who was her associate in conducting said rooming house. There is no better method of sifting the conscience and testing the veracity and credibility of the witness than by cross-examination, and a witness can also be cross-examined as to specific acts tending to discredit her, when such facts are relevant to the issue. There is no occasion here to discuss this question further than to say that we believe that, as the case was being tried in a county where the witnesses were all comparative strangers, and as the defendant injected this issue into the case, and thereby attempted to cast reflections upon and besmirch the character of the deceased and the peace officers who were witnesses for the prosecution, the court properly held that the prosecution had the right to show the moral character of the witness and her meretricious conduct and mode of life.

Third. "Error of the court in permitting the prosecuting attorney to ask incompetent and prejudicial questions of the witness." The following excerpt from the brief of counsel for the defendant shows the record upon which this assignment of error is based:

"Dr. O. P. Kernodle, a witness produced for the purpose of impeaching the testimony of Dr. Schwartz, was interrogated by the county attorney in the following entertaining manner. Q. Are you able to state—do you know—his general reputation in Enid?' Q. What is his general reputation, good or bad?' 'Q. For general character?' 'Q. What is his general reputation for honesty?' This last question was objected to and overruled 'as to honesty.' 'Q. From your observation, can you say, as a physician, whether he is probably a dope fiend?' 'Q. That is, a taker of cocaine, or morphine?' 'Q. Can you say what are the outward evidences, the visible evidences, or do you know what they are, of a person who takes cocaine or morphine?' Proper objections were made to these questions, but the court remained silent. The situation, however, required some explanation, and accordingly the county attorney, in the presence of the jury, and over the objection of the defendant, made this somewhat startling offer: 'The counsel for the territory wishes to prove by these witnesses—this witness—that a person who takes such drugs that it affects his moral nature so that he becomes irresponsible and unveracious, and is not to be trusted, and it degenerates his moral character—' This statement ends with a dash, indicating that the county attorney had more of the same kind on hand. This is manifest by that which follows: The witness was then asked if he had ever talked with Dr. Schwartz about his life, and the county attorney then proceeded: 'Q. Can you say from what you have seen of him—from your knowledge as a physician—are you prepared to say what his moral nature is?' 'Q. Does the moral nature of a person influence his likelihood to tell the truth?' 'Q. Is it possible to judge of a man's mental process and his moral process—for a physician to judge—that is, who is acquainted with the things he does and says?' 'Q. Can a physician, and is there any learning in medicine that allows a physician to judge of the truth-telling capacity of a person, when he has made observations of his morals?'

"The court sustained objections to all of these questions, but did not admonish the county attorney to desist, nor advise the jury that the conduct of the county attorney was improper, and that they should not consider the matters assumed in the questions asked, and this, we think, was highly prejudicial to the rights of the defendant. The county attorney did not desist after asking the foregoing metaphysical questions, but proceeded to inquire as to the general reputation of Schwartz as to sobriety and dissoluteness, and, as a parting shot, propounded the following, which we commend as being worthy of a place among the great hypothetical questions: 'Q. Does the question of sobriety, dissoluteness of living, or the taking of drugs, such as morphine or cocaine, as a medical fact, bear upon the truth-telling capacity of a person?' In the case at bar the court merely sustained the objections to the questions without comment, without any admonition to the prosecutor to desist, nor were the jury cautioned not to consider the matters suggested by the questions ruled out by the court."

The record shows that the witness Dr. Schwartz, as a witness for the defendant, testified that he was present at the time of the killing, and his testimony tended to corroborate that of the defendant to the extent that the deceased made a motion as though he was going to unbutton his overcoat. The record shows that the prosecution introduced evidence tending to impeach this witness, and tending to show that he was not present when the killing occurred, and that he had been drinking to such an extent as to impair his ability to see and apprehend what happened at the time of the tragedy, and that he had made statements inconsistent with his testimony. All of this testimony was competent; and, while any diseased impairment of the testimonial powers, arising from whatever source, may be considered by the jury, if its presence is apparent, it must be left to be shown by cross-examination. On principle, no hypothetical question is permissible, based on habit, to test veracity or credibility. The objections made were properly sustained by the court; but, as no motion was made on behalf of the defendant to withdraw from the consideration of the jury the questions and remarks of the prosecuting attorney now complained of, we cannot believe that his able and distinguished counsel thought his rights might be prejudiced thereby, and we are of the opinion that the defendant was not prejudiced thereby.

While the record discloses some irregularities, we believe that the defendant had a fair trial. The facts and circumstances, as shown by the evidence, are so conclusive as to the guilt of the defendant that no honest jury could fail to convict him of the crime. The record is conclusive that the irregularities complained of could not have changed the final result.

There being no prejudicial error shown by the record, the judgment of the district court of Blaine county, Okla. T., is affirmed, at the cost of plaintiff in error, and the district court of Blaine county, Okla., is directed to proceed and have the judgment and sentence carried into execution.

FURMAN, PRESIDING JUDGE, and BAKER, JUDGE, concur.

WOODSON H. MORRIS V. TERRITORY.

No. 116, Okla. T. Opinion Filed January 29, 1909.

(99 Pac. 760.)

1. **EVIDENCE—Discretion of Court—Admission of Photographs.** (a) As to whether a photograph of a place or premises, on which it is charged that an offense was committed, is admissible in evidence, in any particular situation of a trial, is within the discretion of the trial judge; and his determination will not be disturbed if there was any reasonable ground therefor.

(b) When the photographer who made the photographs of the premises where the homicide took place testified that they did not correctly show the distances and the relation of the objects which they purported to represent, it was not error for the trial court to refuse to allow them to be introduced in evidence.

(c) Photographs of persons, when proven to be correct, and when relevant to some issue in a case, are admissible in evidence.

2. **EVIDENCE—Homicide—Witnesses—Threats by Third Persons—General Questions—Exceptions—Communication of Threats.** (a) Threats

made by a third person against a defendant are not admissible until some evidence has been introduced which would give the defendant reasonable ground to believe that such third person was acting with the deceased in a common design to injure or kill the defendant.

(b) "Have you heard any of the Cassidays make any demonstrations or statements against the life of the defendant?" held to be an improper question, as being too general.

(c) When a defendant seeks to introduce threats made by a third person against him, the question as to such threats must indicate what particular person is being inquired about, so that the court can determine its relevancy to the issues in the case.

(d) An exception must be saved to alleged errors of the trial judge in the admission or exclusion of evidence, or they will not be reviewed upon appeal.

(e) When threats have been communicated to a defendant, evidence of this fact is admissible, when relevant, without requiring proof that such threats were actually made by the deceased.

(f) For a discussion of the philosophy of the law relating to evidence of threats, see opinion.

3. **FORMER JEOPARDY—Plea—Sufficiency—Identity of Offenses.** (a) If a plea of former acquittal or former jeopardy shows upon its face a different offense from that for which the defendant is then on trial, or if it is otherwise fatally defective, it should not be submitted to the jury, but should be stricken from the record of the court.

(b) If, in the same affray, a person shoots and kills one person, and by a second shot kills another person, he may be separately prosecuted for killing each of them, and may be properly acquitted in one case and convicted in the other.

4. **INSTRUCTIONS—Construction as a Whole—Homicide—Premeditation—Anger or Intoxication.** (a) Instructions to juries must be considered as a whole, and when so considered, if it appears that the law applicable to each issue in the case has been correctly given and the instructions are not contradictory or misleading, they are sufficient.

(b) If from any cause, at the time of the homicide, the mind of the defendant was in such a condition as to be incapable of forming a premeditated design to effect the death of the person slain, or of any other human being, he cannot be guilty of murder, unless it be proven that this state of mind, at the time of the killing, grew out of his intentional and wrongful conduct, of such character as to show that the killing was the result of previous premeditation and formed design.

(c) The mere fact that a defendant may be angry or in a condition of voluntary intoxication will not prevent an unlawful killing from being murder, provided that the defendant was in such a condition as to be able to form a design to effect the death of the party slain or any other human being.

5. **HOMICIDE—Instructions—"Passion," "Anger"—Separation of Offenses.** (a) The use of the word "passion" or "excitement" in defining murder, in addition to the word "anger," used in the statute, does not render the instructions more burdensome to the defendant or take from him any substantial right.

(b) When, in the same affray, a defendant by separate shots kills two persons, and has been indicted, tried, and acquitted for the murder of the person killed by the first shot, and is upon trial for the murder of the second person so killed, the court should instruct the jury that the prosecution is bound by the issues necessarily determined in the first trial, and that said judgment of acquittal is conclusive, and the issues therein determined cannot be tried again; and that the jury must hold the defendant justifiable in killing such first person, and that no presumption of guilt could be entertained against the defendant, upon his trial for murder of the second person killed, on account of such first killing.

6. **INSTRUCTIONS—Paragraphing.** When a defendant is on trial on the charge of murder, it is not necessary for the trial court to state the law upon any given issue applicable to the evidence of the defense in a separate paragraph from the law applicable to the evidence of the prosecution upon the same issue. When it can be done, the court may state in one paragraph the law applicable to the evidence on both sides of an issue.

7. **INSTRUCTIONS—Good Character—Requested Instructions.** (a) The better and safe practice is for trial courts, when evidence of the good character of the defendant is proper and has been introduced, to instruct the jury upon this issue.

(b) In instructing on character the court should exercise care not to trench upon the province of the jury. All that is necessary for the court to do is to inform the jury that they may give to evidence of character such weight as they may deem proper in connection with all the other testimony in the case, and the doctrine of reasonable doubt.

(c) Opinion of Supreme Court of United States in **White v. U. S.**, 164 U. S. 100, 17 Sup. Ct. 39, 41 L. Ed. 365, with reference to instructions on character, approved and commended to the judges of Oklahoma.

(d) When a defendant requests an instruction, applicable to any issue in a case, and the trial judge should be of the opinion that the law is not correctly stated in such requested instruction, it is the duty of the trial judge to modify such requested instruction, or to give an instruction containing a correct statemetn of the law.

8. **STATUTES—Construction of Penal Statutes — Review — Harmless Error.** (a) By statute the common-law rule of strict construction of penal laws has been repealed, and this court is required to construe all laws liberally and in furtherance of justice; and we are expressly

forbidden to render judgment upon any technicality or exception which does not affect a substantial right of a defendant.

(b) For statement of testimony, in view of which the trial judge did not commit reversible error in failing to instruct the jury upon the question of character, see opinion.

ON MOTION FOR REHEARING.

Former Decision Distinguished.—Case of W P. Price v. Territory of Oklahoma, ante, p. 358, 98 Pac. 447, distinguished from case at bar.

(Syllabus by the Court.)

Appeal from District Court, Kay County; John H. Burford, Judge.

Woodson H. Morris was convicted of murder, and he appealed to the Supreme Court of Oklahoma Territory, whence the cause was transferred under the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) and the Constitution of Oklahoma to the Supreme Court of the state, whence it was transferred to the Criminal Court of Appeals. Affirmed.

At the March, 1906, term of the district court of Kay county, an indictment was returned by the grand jury against Woodson H. Morris (hereafter called defendant), charging him with the murder of Finis Cassiday, alleged to have been committed on the 27th day of February, 1906. The defendant was arraigned, and pleaded not guilty. The defendant was found guilty of murder upon said indictment, without capital punishment, and was sentenced to imprisonment for a period of his natural life. A motion for a new trial was filed. This was overruled. An exception was duly reserved. The case was brought by appeal to the Supreme Court of Oklahoma Territory. Upon the admission of Oklahoma into statehood, as directed by the enabling act and the Constitution of the state, the case was transferred to the Supreme Court of the state. As directed by law, the case was transerred to the Criminal Court of Appeals upon its creation.

Sam K. Sulivan and *W. C. Tetirick*, for plaintiff in error:—

On admissibility of photographs: *Dedericks v. Salt Lake City R. Co.* (Utah) 46 Pac. 656; *State v. Rogers* (Iowa) 105 N.

W. 455; *State v. Riley,* 126 Mo. 597, 29 S. W. 577; *Smith v. Territory* (Okla.) 69 Pac. 807; *People v. Crandall,* 125 Cal. 133, 57 Pac. 785; *Barker v. Town of Perry* (Iowa) 25 N. W. 100; *Waynard v. Oregon R. & Nav. Co.,* 78 Pac. 983.

On question of threats: 21 Cyc. 893, 896; *State v. Porter,* 49 Pac. 969; *State v. Clifford,* 52 S. E. 981.

On question of charge on murder: *State v. Rhodes,* 1 Houst, Cr. Cas. 476; *People v. Bush* (Cal.) 3 Pac. 593; *State v. Henderson* (Or.)32 Pac. 1031; *Kirk v. Territory* (Okla.) 60 Pac. 797; *Wood v. State* (Miss.) 33 So. 285; *Gee v. State* (Miss.) 33 So. 19;*Mahaffey v. Territory,* 11 Okla. 213.

On question of former jeopardy: Wilson's Rev. & Ann. St. 1903, §§ 5434, 5435; *State v. Price* (Iowa) 103 N. W. 197; *State v. Cooper* (N. J.) 25 Am. Dec. 490; *Dill v. People* (Colo.) 36 Pac. 230.

W. C. Reeves, Asst. Atty. Gen., and *C. L. Pinkham,* for the territory.—

On question of former jeopardy: Abbott's Crim. Brief, p. 141; 1 Bishop's Cr. Pro., § 817; 12 Cyc. 289; *Hite v. State,* 9 Yerg. 357; *Epps v. State,* 38 Tex. Crim. Rep. 284; *Winn v. Winn,* 82 Wis. 571; *State v. Nash,* 86 N. C. 650; *Kelly v. State,* 46 Tex. Crim. 40; *State v. Robinson,* 12 Wash, 491; *Teat v. State,* 53 Miss. 439; *People v. Majors,* 65 Cal. 138; *Jones v. State,* 61 Ark. 88.

On admissibility of photographs: 22 A. & E. Enc. Law (2nd Ed.) 772; Underhill Crim. Ev., p. 63;*Mauch v. City of Hartford* (Wis.) 87 N. W. 816.

FURMAN, PRESIDING JUDGE. (after stating the facts as above). First. Defendant complains of the action of the trial judge in sustaining objections to the admission of three photographs of the premises where the homicide was committed. The Supreme Court of Wisconsin correctly states the rule with reference to the admission of photographs in evidence:

"Whether a photograph is proper or not in any particular situation upon the trial of a case is a matter within the sound discretion of the trial judge, and his determination cannot be disturbed if there was any reasonable ground therefor." (*Mauch v. City of Hartford,* 112 Wis. 40, 87 N. W. 816.)

"The right to introduce photographs in evidence is always dependent upon the making of preliminary proof of their accuracy." (Ency. Law, vol. 22, p. 775.)

"The photograph or picture must be relevant as well as correct. Its relevancy will depend on the relevancy of the scene or object it represents. If a photograph purports to represent a relevant scene or object, but portrays it in a grossly inaccurate manner, so that it practically represents something else, and the scene or object would scarcely be recognized, thereby the nonreliability of the photograph, as a correct likeness, may almost be considered as producing irrelevancy. But usually the question of relevancy is distinct from that of correctness, and is for the judge exclusively." (Underhill, Criminal Evidence, p. 63.)

Photographs of persons, animals, and written instruments are generally accurate and reliable, and when proven to have been properly made, and when relevant to some issue in a case, as a rule are admissible in evidence. This question came before the Supreme Court of Oklahoma Territory in *Smith v. Territory,* 11 Okla. 669, 69 Pac. 805. In that case the trial court admitted in evidence photographs of the deceased, showing the nature and location of the wounds and the course taken by the bullet. These photographs were offered in connection with the testimony of the surgeons, and after it had been shown that the photographs had been accurately taken and were true representations of the location of the wounds. Upon this showing the court held that the photographs were competent evidence and had been properly admitted. This was the only question with reference to the introduction of photographs as evidence, submitted to the court, and to this extent only can the decision be considered as authority. The question of the admission of photographs of places or premises was not submitted to the court. The admission of photographs of premises in evidence should be governed by the same rules as govern the admission of maps, plats, or diagrams. They must be shown to be correct before they are admissible as evidence. If a map were admitted to be misleading and inaccurate, no one will claim that it would be competent. As is shown by the testimony of the photographer in this case, these photographs of the premises were misleading as to the distances, objects, and conditions which they purported to represent. But we place our decision upon another ground also. Under our statute, the admission of photographs or maps as evidence is addressed to the discretion of the trial court, under the circumstances of each particular case.

Section 5510, Wilson's Rev. & Ann. St. Okla. 1903, is as follows:

> "(5510) § 374. When in the opinion of the court, it is proper that the jury should view the place in which the offense was charged to have been committed, or in which any other material fact ocurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by a person appointed by the court for that purpose, and the officer must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

From this it is seen that the right to have the jury view the place where the offense charged was alleged to have been committed is subject to the discretion of the judge. A photograph or map of such place would be only secondary evidence, because it would not be the best evidence. It would be illogical and absurd to say that secondary evidence should be admitted arbitrarily, when, according to the plain letter of the statute, the best evidence as to the matter in controversy is only admissible "when in the opinion of the court it is proper." In the case of *Reed v. Territory, ante,* p.—, 98 Pac. 583, this court discussed the right of inspection by the jury, and held that it was subject to the judgment and control of the trial court. This discretion is not subject to review upon appeal, unless it appears that there has been abuse of discretion by the trial court. In the case at bar, we find that there was no abuse of discretion in the action of the trial court in excluding the photographs offered in evidence.

Second. A witness for the defense was asked if he had ever heard the Cassidays make any statements against the life of the defendant. Upon objection being made, the witness was not permitted to answer this question. The defendant excepted to this ruling of the court. The witness was then asked as to threats made by P. W. Cassidy against the defendant. Objection being made, this question was excluded by the court. To this ruling, no exception is contained in the record. The only exception saved was to the ruling of the court upon the first question. This question was objectionable because it was too general and did not identify any person inquired about. It included all the Cassidays, when the record disclosed that there were at least two of that name who testified in this case, and who were in no manner connected with the difficulty. The witness was permitted to answer a question with reference to threats made by Finis Casssiday, the deceased, for the murder of whom defendant was then on trial, but the court held that the witness could not be interrogated as to any statements made by P. W. Cassiday. When a defendant seeks to justify his act in taking the life of the deceased upon the ground of communicated threats and overt acts of the deceased at the time of the homicide, the inquiry as to threats must be confined to those made by the deceased or by some one acting with him.

The philosophy of the law of communicated threats in cases of homicide, when self-defense is relied upon, is that such threats may be considered by the jury for two purposes:

(1) As showing the state of mind of the defendant and the reasonableness of his apprehension or fear of imminent peril of receiving serious bodily injury, or of losing his life at the hands of the deceased at the time of the homicide, based upon some act then done by the deceased which, viewed in the light of such communicated threats, indicated a purpose on the

part of deceased to then carry such threats into execution. In order to make communicated threats admissible for this purpose, it is not necessary to prove that they were in fact made by the deceased. It is sufficient to prove that they were communicated to the defendant as having been made by the deceased under such circumstances, and coming from such a source, as would authorize a reasonable man situated as the defendant then was, to honestly believe that such information was true.

After an able and exhaustive discussion of this question by the Court of Criminal Appeals of Texas, in the case of *Logan v. State,* 17 Tex. App. 50, that court held that in cases of communicated threats it was not necessary to prove that such threats were actually made. The real questions are, Were they communicated to the defendant? and, Were they of such a character, in connection with the acts of the deceased at the time of the homicide, as to create a reasonable apprehension or fear of death or serious bodily harm, in the mind of the defendant, at the hands of the deceased, at the time that the defendant fired the fatal shot? In *Logan's Case* the trial court refused to allow the defendant to prove that such threats had been communicated to him, just before the fatal difficulty, by one John Tosh. After the homicide, and before the trial, Tosh had died. A number of witnesses heard Tosh communicate the threats to Logan. The trial court held that such communicated threats were hearsay, unless the defendant first proved that they were actually made by the deceased. Upon a review of the entire matter and a full discussion of the authorities, the court held that the fact that such threats were communicated to the defendant was original evidence, and that its exclusion was error.

The force of the logic of this position is unanswerable, for two reasons: First. An honest mistake of fact, based upon reasonable grounds, does not make a man a felon. Second. A defendant is always justifiable in acting in his self-defense, or in the defense of his family or property, according to the circumstances as they reasonably appear to him at the time; and if he acts in good faith, and upon reasonable appearances of danger, the law will hold him guiltless, although it may afterwards turn out that he was mistaken, and there was in fact no danger. As to this issue, the question is not, Were the threats actually made? but it is, Did the defendant have reasonable ground to believe, and did he in good faith believe, that the threats had been made, and that deceased then did some act indicating a purpose to carry such threats into execution? The first ground upon which communicated threats are admissible deals alone with the purpose, the intention, the state of mind, and the apprehensions of the defendant. It has nothing at all to do with the state of mind of the deceased. But suppose that a third person is present at the time of the homicide, and by some word or act then spoken or done gives the defendant reasonable ground to believe that he is acting with the deceased in pursuance of a common design to inflict serious injury upon or to kill the defendant; then the defendant may introduce evidence of threats communicated to him, purporting to have been made by such person, and the admissibility of such communicated threats will rest upon the same ground and be governed by the same principles as are the communicated threats purporting to have been made by the deceased. In the case of *Price v. Territory, ante,* p. —, 98 Pac. 447, this court held:

> "When there is the least degree of acting together between two or more parties in the perpetration of an unlawful act, the threats or declarations of one in furtherance of the common design are admissible against all of his associates, although made in the absence of the others."
>
> "But evidence of threats made against the defendant by a person who was not present at the homicide, and is not shown to have been acting with the deceased, is not admissible." (21 Cyc. p. 896, and authorities there cited.)

This is the basis, the extent, and the limit of the rule admitting threats made against the defendant by any other person than the deceased, in cases where threats are admissible.

The second purpose for which communicated threats may be considered by the jury is to aid them in determining as to who was probably the aggressor in the fatal difficulty. This involves the state of mind and the intentions of the deceased, as well as the defendant, and like uncommunicated threats, before they can be introduced in evidence, to be considered for this purpose, it must be proven that they were actually made by the deceased, or by some one acting with him, under the conditions hereinbefore stated. To make this clear: If it is proven that threats purporting to have been made by the deceased, or some one acting with him, to kill or inflict serious bodily injury upon the defendant, were simply communicated to the defendant, then they are admissible, and can only be considered by the jury for the purpose of determining the reasonableness of the defendant's apprehensions of receiving death or great bodily harm at the hands of the deceased or the person so acting with him, as hereinbefore stated. While, upon the other hand, it must be proven that such threats were actually made by the deceased, or such other person acting with him, against the defendant, before they can be considered by the jury for the purpose of assisting them to ascertain the state of mind of all of the parties engaged in the fatal difficulty and determining who probably began the difficulty. From these premises, it necessarily follows that before any questions can be asked as to threats made by third persons, there must be at least some evidence that such third person was present at the time of the homicide and was acting with the deceased in the commission of an unlawful act against the defendant.

Threats made by persons not so acting with the deceased in pursuance of a common design to injure or kill the defendant are irrelevant to the issue upon such trial, and are not competent as evidence. The record shows that there were two persons named Cassiday who appeared as witnesses in this case, and as to whom it is not claimed that they were present or in the most distant manner acting with the deceased, Finis Cassiday, in the pursuance of a common design to injure the defendant. The question asked and held improper included these persons, and in fact all other persons named Cassiday known to the witness. The witness might as well have been asked if he had ever heard any person make a threat against the defendant. The court properly sustained the objection to the general question asked. As no exception was taken to the refusal of the court to allow the witness to be questioned as to threats alleged to have been made by P. W. Cassiday, we cannot consider that matter without violating the rule that an exception must be taken to alleged errors of the court in the exclusion or admission of evidence, in order to secure a review of such ruling by this court, unless the error complained of was fundamental. We will state, however, that, even if the action of the court in excluding the question as to threats alleged to have been made by P. W. Cassiday had been excepted to, we are of the opinion that no error was committed. Our reasons for this conclusion will be given when we come to discuss the instructions given by the court to the jury in another section of this opinion.

Third. The defendant, among other defenses, pleaded in bar to this prosecution former acquittal and also former jeopardy. This plea was based on the fact that the defendant had been tried and acquitted of the murder of P. W. Cassiday. The defendant also, in support of this plea, was permitted to introduce in evidence the entire record, containing all of the testimony in the case against defendant for the murder of P. W. Cassiday. After the evidence for the prosecution in this case had been introduced, the trial court, upon this testimony and the record offered by the defendant, sustained a motion made by the prosecution to strike out the plea of former acquittal and ot former jeopardy. To this the defendant duly reserved an exception.

The contention of the defendant is that the plea of former acquittal and former jeopardy should have been submitted to the jury and been determined by them as questions of fact. For a proper application of the legal principles involved in this question, it is necessary that we should make a brief statement of the evidence offered in support of the pleas interposed. P. W. Cassiday and Finis Cassiday were both killed by the defendant in the same difficulty. There were no witnesses to the killing of these parties, except the defendant. P. W. Cassiday was killed first. In their brief, counsel for the defendant contend that not more than 30 seconds elapsed between the killing of P. W. Cassiday and the killing of Finis Cassiday, and therefore both killings constituted one transaction, and that, as defendant had been acquitted of the murder of P. W. Cassiday, he was entitled to his discharge in the case for the murder of Finis Cassiday, upon the grounds of former acquittal and former jeopardy, and that these pleas should have been submitted to the jury. It is not claimed that the same shot killed both parties. On the contrary, the record conclusively shows that P. W. Cassiday was killed by the first or second shot fired by the defendant, with a shot gun, while Finis Cassiday, according to defendant's own testimony, was killed by a shot fired by the defendant with a pistol some 30 seconds after the shot from the shotgun which killed P. W. Cassiday. Does this state of facts raise the question of former acquittal or former jeopardy? We are constrained to answer this question in the negative. The following authorities are conclusive on this point:

"The issue raised by plea of former acquittal or conviction is for the jury, under proper instructions of the court; but if the plea shows on its face a different offense, or is wholly insufficient, it need not be submitted to the jury." (Abbott's Crim. Brief, p. 141.)

In the case of *Dill v. People*, 19 Colo. 469, 473, 36 Pac. 230, 231 (41 Am. St. Rep. 254), cited by plaintiff in error, the court says in its opinion: "The court did not err in sustaining the demurrer to the plea of *autrefois acquit.*"

Also in the case of *State v. Price*, 127 Iowa, 301, 103 N. W. 197, likewise cited by plaintiff in error, the defendant pleaded former acquittal of a charge of rape to a charge of incest, and the prosecution interposed a demurrer to such plea, which was sustained.

"* * * Where the offenses charged in different indictments are so diverse as not to admit of proof that they are the same, the court may decide the issue without submitting it to the jury." (*Epps. v. State*, 38 Tex. Cr. R. 284.)

"If the plea is in form inadequate, or if the offenses in the two indictments cannot be the same, the prosecuting officer demurs." (1 Bishop's Cr. Pro. § 817.)

"To an indictment charging a shooting with intent to kill, defendant pleaded that he had once been tried and acquitted under a charge of maliciously shooting and wounding a horse, and that the shooting charged in the two prosecutions was one and the same shooting. Held, that a demurrer to his plea was properly sustained." (*State v. Horneman,* 16 Kan. 452.)

"* * * If, in the said affray, a person shoots and kills one person, and by a second act shoots and wounds another, in such case the two results, the killing of the one and the wounding of the other, being different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately for each." (*Gunter v. State,* 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17.)

"But where one assaults or kills two persons by separate shots or strokes, although in the same riot or affray, an acquittal or conviction of one assault or homicide is no bar to an indictment for the other, as they are distinct acts." (Cyc. vol. 12, p. 289.)

"A plea of *autrefois acquit,* showing on its face that the offense for which the prisoner was formerly tried is separate and distinct from that for which he stands indicted, is demurrable." The court further said: "The killing was the result of a separate act in each case, committed under degrees of provocation not necessarily the same. In fine, every element to constitute two separate offenses appears on the face of the plea to exist in this case, and therefore the demurrer was properly sustained." (*State v. Evans,* 33 W. Va. 417, 10 S. E. 792.)

"The fact that the act of killing Jesse Hibdon and the act of killing Charles Hibdon were so closely connected in point of time that it was impossible to separate the evidence relating to each of them would not necessarily make the killing of the two one act or one offense. * * * We think there was no error in sustaining the demurrer to the plea." (*Jones v. State,* 61 Ark. 88, 32 S. W. 81.)

In the case of *People v. Ochotski,* 115 Mich. 601, 73 N. W. 889, it is held that, where a defendant was acquitted upon the charge of assault and battery upon one person, such acquittal was no bar to a subsequent prosecution for an assault with intent to do great bodily harm upon another person, although the assaults were made at the same time and in the same affray. In passing upon the question of former jeopardy in the above case, the court uses the following language:

> "But it is contended that the record shows that the respondent in another trial had been acquitted of an assault and battery upon the person of Mr. Heike, growing out of the same transaction as here set out, and therefore that he could not be convicted in the present case. * * * We think the court below was not in error in holding that the acquittal of respondent of the assault upon Mr. Heike would not relieve him in the present proceeding. It was not a trial for the same offense, within the meaning of the Constitution. There is a difference between one violation and one transaction. While it is true that these two offenses grew out of the same affray, yet, no claim is made that the same blows by which Mrs. Heike was injured were the ones which injured Mr. Heike. Bishop, in his work on Criminal Law, lays down the rule that in one transaction a man may commit distinct offenses of assault or homicide upon different persons, and be separately punished for each. Bishop, Crim. Law, § 1061. * * * In the present case it was not the same blow, even, which caused the injury to the two, but different blows. It was the same transaction, but not the same volition."

In the case of *Johnson v. State, ante,* p. —, 97 Pac. 1059, this court held that when the facts stated in a plea of former jeopardy did not constitute a bar to a second prosecution, it was the duty of the trial court to strike the plea from the record.

If there is any evidence in the record which tends in law to support a plea of former acquittal or former conviction or former jeopardy, the issue should be submitted to the jury, and let them pass upon the credibility of the witnesses and the weight of the evidence, under proper instructions from the court as to the law. But where such a conclusion is not a possible, legitimate deduction to be drawn by the jury from the evidence, the court should strike the plea from the record, as was done in this case. Beyond all controversy, the killing of P. W. Cassiday and of Finis Cassiday were two separate and distinct acts, committed with different weapons.

Fourth. The court instructed the jury as follows:

"If the shooting of Finis Cassiday with the revolver was not justifiable on the grounds of self-defense, and you find from the evidence, beyond a reasonable doubt, that the defendant fired said shot in a heat of passion, and without any design to effect the death of Finis Cassiday, you will then find him guilty of manslaughter in the first degree. Or if he was not justifiable in shooting Finis Cassiday with the revolver after he had got out of the wagon, and you find from the evidence, beyond a reasonable doubt, that the deceased, Finis Cassiday, had made an attack upon the defendant with a deadly weapon, and that the defendant killed him unnecessarily after such attack had failed, you will then find him guilty of manslaughter in the first degree."

The defendant reserved an exception to this instruction. The contention of the defendant is that this instruction is erroneous for two reasons: First, that it required the defendant to prove to the jury that he was not guilty of murder beyond a reasonable doubt, before they could consider the question of manslaughter; second, that it required the defendant to prove to the jury beyond a reasonable doubt that he was attacked by Finis Cassiday with a deadly weapon before they could consider the question of manslaughter. We admire the force and ingenuity with which these questions are presented in the brief of counsel for the defendant, and the apparent weight of authority which they cite in support of their contention. Taking this isolated paragraph of the instruction, and considering it by itself and without regard to other portions of the instructions given, then the position of defendant does appear to be supported by reason and authority. But it must be remembered that it is impossible to incorporate in one paragraph all of the law applicable to every issue in a case. The best practice is to divide instructions into paragraphs and then to incorporate in each paragraph as near as possible all of the law applicable to the issue of fact therein submitted to the jury. This was the method pursued by the able judge who presided at the trial of this case.

The court had previously correctly instructed the jury upon the law of reasonable doubt, not only as applied to the issue of not guilty, but also as applied to the different degrees of the offense charged, these degrees being murder and manslaughter in the first degree. The court most fairly and fully instructed the jury upon the issue of justifiable homicide. In the paragraph now under consideration, the court says: "If the shooting of Finis Cassiday with the revolver was not justifiable on the ground of self-defense, and," etc. As the jury had already been fully instructed on the law of self-defense, and the doctrine of reasonable doubt applicable thereto, it was not necessary to repeat these instructions again. All that a defendant or the state is entitled to is one clear, clean-cut, and affirmative instruction as to each issue presented by the evidence favorable to either side; and that there must not be in the instructions any other statement of law, which is contradictory of such clear, clean-cut, and affirmative instruction. Unnecessary repetitions of correct propositions of law are liable to give them undue prominence in the minds of the jury, and thus improperly affect their verdict. This practice was condemned in the case of *Price v. Territory, ante*, p. —, 98 Pac. 447. That case presents our views upon this question so fully that a further discussion of this matter is not necessary here. The following portion of the first paragraph in the instruction complained of instructs the jury substantially in the language of the second subdivision of the statute defining manslaughter in the first degree, and requires the jury to find the matters of fact therein stated, beyond a reasonable doubt, before they could convict the defendant. So it is seen that so far the defendant has no cause to complain. The first sentence in the second paragraph of the instructions is as follows: "Or if he was not justifiable in shooting Finis Casiday with the revolver after he got out of the wagon," etc.

Instructions must be considered as an entirety, and when so considered, if it appears that the jury have been fully and affirmatively instructed as to the law applicable to each legitimate issue in the case, and there is no conflict between the instructions so given, and neither side can claim that any injustice has been done by the instructions, the judgment of the trial court should and will be sustained. So, the first sentence in the second paragraph of the instruction complained of must be considered in connection with the instruction upon the issue of justifiable homicide, given in another portion of the instructions. As the sentence above quoted does not alter, abridge, or in any manner contradict or conflict with the instructions on the subject of justifiable homicide, we cannot see how it deprives the defendant of any substantial right. The latter portion of the second paragraph is in the exact language of the third subdivision of the statute on manslaughter in the first degree. Wilson's Rev. & Ann. St. 1903, § 2175. As far as this instruction goes, we hold it as being absolutely correct. In some cases it might be necessary for the court to go further and make plain the fact that, in order to reduce a killing from murder to manslaughter in the first degree, it is not necessary that the unnecessary killing should take place immediately after the attack described in this instruction had failed. In cases, such as the one now under consideration, a necessary element of the offense of murder is that the killing must have been done "without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being."

"A design to effect death, sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution." (Wilson's Rev. & Ann. St. 1903, § 2169.)

"Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time." (Wilson's Rev. Ann. St. 1903, § 2170.)

These different sections of our statutes must all be considered together and in harmony with each other. In cases like the one now before us, the first element of murder is that the killing must be unlawful, and, in addition thereto, that it must have been committed with a "premeditated design to effect the death of the person killed, or some other human being."[1] There must have been premeditation and a formed design to unlawfully take human life. Without either of these elements, there cannot be murder in such cases as this. Section 2170, above quoted, means that although the defendant may be angry, or in a state of voluntary intoxication, this does not reduce his offense to manslaughter, provided he was in such a state of mind as to be capable of premeditation and reflection upon the nature and consequences of his act, and was capable of forming a design to effect death.

We are sustained in these views by the opinion of Judge Burford in the case of *Jewell v. Territory,* 4 Okla. 53, 43 Pac. 1075:

"These statutes are intended to classify all grades of homicide, and to furnish a specific definition for each class. Under subdivision 1, § 2078, St. 1893, the homicidal act must be done with a premeditated design to effect the death of the person killed, or some other person. The premeditated design to effect death is the material element of the offense, and must exist at the time the homicidal act is committed, or there is no murder. It is not sufficient that the fatal shot was fired premeditatedly, for this only implies that the act is done in pursuance of a prior determination. This may be true and yet the shot have been fired for the purpose of maiming or disabling the injured party. Nor is it sufficient to allege that the homicidal act was done with malice aforethought. In its legal sense 'malice' expresses the idea of a willingness to injure another, and when qualified by the word 'aforethought' it implies that the act was done on a previous determination. And one may shoot at another with malice aforethought, intending only to break his pistol arm or disable him, yet with no design to affect the death of the person he desires to injure. Murder, at common law, was committed when a person of sound mind and discretion unlawfully killed any reasonable creature in being, in the peace of the sovereign with malice aforethought, either express or implied. According to this rule, if one feloniously and with malice aforethought wounded another, from which wound death ensued within a year and a day, it was murder, unless excuse or justification was shown. Under our statute such act would not constitute an element of murder unless perpetrated with a premeditated design to effect the death of the person killed or of some other person, but would be embraced within some one of the lower degrees of homicide."

We commend a careful reading of this entire opinion, as presenting an admirable statement of law applicable to the statutes above referred to. In *Wright v. Territory*, 5 Okla. 78, 47 Pac. 1069, Judge Keaton commended the doctrine announced in Jewell's Case, and sustained a demurrer to the indictment because it failed to allege that the killing was the result of a premeditated design, or intent, to effect the death of the person killed. If it is necessary to allege these elements of murder, it is equally necessary to prove them by competent evidence, as matters of fact, to the satisfaction of the jury beyond a reasonable doubt. The opinion of Judge Bierer, in *Holt v. Territory*, 4 Okla. 76, 43 Pac. 1083, is to the same effect.

In *Smith v. Territory*, 11 Okla. 656, 69 Pac. 803, Judge Hainer said:

"Homicide is murder, as defined by our crimes and punishment act, when perpetrated without authority of law, and with a premeditated design to effect the death of the deceased, or any other human being."

So it is seen that the authorities are unanimous to the effect that under our statutes there can be no such thing as murder in cases like this, unless it was committed in pursuance of a premeditated design to effect the death of some human being. The law is not seeking victims; it does not set up an angelic standard by which men shall be tried; it makes allowance for the weakness and imperfection of human nature. The result is that, if for any reason a defendant who is charged with a felonious homicide can prove that at the time the killing occurred he was in such a state of terror or rage, or was otherwise incapable of premeditation or forming a design to effect the death of some human being, or if the evidence for the state indicates the same state of mind, he cannot be guilty of murder under the statutes above quoted, unless it be proven by the evidence that his mental condition at the time grew out of his own intentional wrongful and illegal conduct, of such a character as to show that the act of killing was the result of premeditation and formed design. Therefore, if the killing takes place after an attempt has been made by the deceased to commit a crime, and if, as the result of such attempt, the defendant, under the influence of such fear, rage, or terror, takes the life of deceased, at a time when the defendant was incapable therefrom of premeditating or forming a design to effect the death of a human being, his act could not be more than manslaughter, even though it might not immediately follow such an attempt on the part of the deceased. By way of illustration: Suppose that A., upon returning to his home, finds his sister, mother, daughter, or wife murdered, or, worse, dishonored. He learns the details of the crime. This might throw him into a frenzy of passion. The trees, rocks, and all inanimate things would cry, "Shame! Shame! Shame!" The fires of perdition might blaze in his heart; reason might reel and stagger on its throne. If, in this state of mind, he should pursue and overtake the incarnate fiend, in human form, who had done this wrong or who had wrought this deed of infamy, and should slay him, who would say that under this condition of mind he was capable of having formed a premeditated design to unlawfully effect the death of the party slain, and would be guilty of murder? It may be said that this is an extreme illustration. This is granted. But, it must be remembered that it is the extreme case that tests the accuracy of a rule of law. We have presented this view for the purpose of preventing a misunderstanding as to what we believe to be the spirit of the law upon the subject of murder. The statute which states that we shall construe all penal laws liberally and in the furtherance of justice requires us to look more to the spirit than to the letter of the law. This is in harmony with the Divine law, which says, "The letter killeth; 'tis the spirit that giveth life."

While we approve the instruction given in this case, as applicable to the evidence in this record, yet it must not be thought that the instruction would be approved in all cases as a correct definition of manslaughter in the first degree. Human ingenuity could not frame an instruction upon the merits of any contested question of fact which would be applicable and sufficient as to all cases that might arise, where there might be a different shade of evidence upon practically the same issue. In this case there was no evidence of such a state of mind on the part of the defendant as would incapacitate him from forming an unlawful premeditated design to effect the death of the deceased, There was no evidence which required an instruction on cooling time. On the contrary, the overwhelming weight of the evidence points to the fact that the defendant did have such a design, as unerringly as the needle of the compass points to the North Pole. The evidence in the case will be presented and discussed in detail when we come to consider another branch of the case. The mere fact that defendant was angry when he fired the fatal shot does not prevent his act from being murder. If it did, it would be seldom indeed when a defendant could be convicted of this offense. But few persons are so depraved and so deeply sunken in moral turpitude as to be able to break into the sacred house of life and shed its precious stream with minds absolutely free from anger, resentment, terror, or some other disturbing passion. There was, therefore, no error in the instruction given and excepted to. It was applicable to the evidence in the case, and went as far as the law required, under the facts in this case.

Fifth. The court instructed the jury as follows:

"No. 3. A design to effect death, sufficient to constitute murder, is inferred from the fact of the killing, unless the circumstances raise a reasonable doubt whether such design existed, and such design may be formed instantly before committing the act by which it is carried into execution. Homicide, committed with a design to effect death, is none the less murder because the prepetrator was in a state of anger, passion, or excitement at the time."

The defendant reserved an exception to this instruction. It is contended by defendant that it was reversible error for the court to give this instruction, because the words "passion or excitement" followed after the word "anger," upon the ground that the statute does not use these words, but only uses the word "anger." Defendant's counsel in their brief state:

> "The said instruction was exceptionally prejudicial when the words 'passion' or 'excitement' were added to it, for the reason that it precluded the jury from entertaining instruction No. 8 in any form whatsoever."

Instruction No. 8 is as follows:

> "No. 8. It is disclosed by the record and the testimony in this case that the defendant at the time and place charged in the indictment, and during the altercation, shot and killed P. W. Cassiday, father of Finis Cassiday. The defendant was indicted for killing P. W. Cassiday, charged with the crime of murder. To this charge he entered a plea of not guilty, and defended said charge upon the grounds that he fired the shot at Finis Cassiday which caused the death of P. W. Cassiday, and that he fired said shot in his own necessary self-defense, and against the assault of Finis Cassiday, with a deadly weapon. Upon the trial of that cause in this court he was by the judgment of the court acquitted. By that judgment the issues necessarily tried and determined are conclusive in this cause, and cannot be again retried. By that judgment it was determined that, in firing the shots from the shotgun which caused the death of P. W. Cassiday, the defendant was justifiable, and that at that time he was not the aggressor, and had reasonable grounds to apprehend a design on the part of Finis Cassiday to take his life or do him some great personal injury, and that he fired the shots from the shotgun in self-defense. These findings in the former case, to the extent set out above, are binding on you in this case, and you are required, in your considerations and deliberations, to treat said findings as facts, and not open to question or inquiry."

We cannot agree with counsel that the use of the words "excitement" or "passion," used in the instruction, in addition to the word "anger," used in the statute, renders the instruction more burdensome to the defendant, or in any manner interfered with any of his substantial rights. Mr. Webster thus defines the meaning of the word "anger":

"A strong passion or emotion of displeasure or antagonism, excited by a real or supposed injury or insult to one's self or others by the intent to do such injury; resentment; wrath; rage; fury; passion; ire; gall; choler; indignation; displeasure; vexation; grudge; spleen. Warmth of constitution often gives rise to anger; a high sense of honor creates indignation at crime."

We see from this that anger includes "a strong passion"; and that it also means "resentment; wrath; rage; fury; ire; gall; choler; displeasure; vexation; grudge; and spleen." The same author aalso defines excitement as follows: "Impulsion; agitation. The act of exciting, or the state of having increased action. That which excites or rouses; that which moves, stirs, or induces action; a motive." So it is seen that excitement does not mean near so much as anger. In common use among the people, in the everyday affairs of life, the words "anger" and "passion" are interchangeable, and mean practically the same thing. We must presume that the jury was composed of men of at least ordinary information and intelligence, and we cannot see how they could have been mislead by the instruction given. Counsel do not object to instruction No. 8, except that it was improperly abridged by the use of the word "passion" and "excitement," as used in the preceding instruction. We regard instruction No. 8 as a clear and admirable presentation of the law applicable to the issues therein stated, and as being not only proper but necessary for a determination by the jury of the case then before them. Under this instruction the defendant was absolutely justified in killing P. W. Cassiday, and the jury were prohibited from going behind the verdict in that case, and were required, in mandatory language, to treat all issues in the case as settled in favor of the defendant, except those which arose after the killing of P. W. Cassiday. It is for this reason that any threats made by P. W. Cassiday against the defendant were not admissible in evidence in this case. P. W. Cassiday was dead when the shot was fired which killed Finis Cassiday. His power to harm defendant was gone. He was not then acting with Finis Cassiday in a common design to kill or injure defendant.

The case of *Mealer v. State,* 32 Tex. Cr. R. 102, 22 S. W. 142, is in point as to this question. The evidence in that case disclosed the fact that, at the time the fatal shot was fired, the deceased was engaged in a scuffle with and was being held by a third party. The defendant came up and killed deceased. The defendant sought to justify his action by offering evidence of threats made against him by the deceased. This evidence was excluded by the trial court. Upon appeal the court said:

"There was certainly no error in the refusal of the court to permit appellant to prove threats against himself on the part of the deceased. The defendant was in no possible danger when he shot deceased."

In the case at bar the defendant was in no possible danger from P. W. Cassiday when he fired the shot that killed Finis Cassiday. Therefore defendant could not have a reasonable apprehension or fear of death or great bodily harm from P. W. Cassiday on account of anything that he may have said or done. Instruction No. 8 justified defendant in firing the shot which killed P. W. Cassiday. This entirely eliminated all that P. W. Cassiday had said or done from the case. It justified the defendant unconditionally in all that occurred up to the killing of P. W. Cassiday, and limited the jury, in determining the guilt of the defendant for killing Finis Cassiday, to what took place after P. W. Cassiday was killed. This instruction is the law under the peculiar facts of this case. It was directly beneficial to defendant, and he cannot be heard to complain at the logical consequences of the instruction. (For an application of these consequences in this case, see what is said in the third section of this opinion upon the subject of threats. The writer would have preferred to have all that is said with reference to any subject in one section of the opinion, but in this case it would have been impossible to do this without lengthy repetitions.)

Sixth. The court instructed the jury as follows:

"No. 9. The state in this case presents for your determination the question: Conceding that Morris was justifiable in firing the shots from the shotgun which killed P. W. Cassiday, and caused Finis Cassiday to fall or crawl from the wagon to the ground, then was he justifiable in drawing his revolver and firing the fatal shot at Finis Cassiday after he was out on the ground? If, after he fired the loads from the shot gun, and Finis Cassiday was out of the wagon, and he had no further reasonable grounds to apprehend that he was in imminent danger of losing his life or suffering some great bodily harm, then he cannot be acquitted on the ground of self-defense, and, if he fired the fatal shot with a premeditated design to take the life of Finis Cassiday, he is guilty of murder."

The defendant reserved an exception to this instruction. The counsel for the defendant in their brief say:

"A plain, unequivocal statement to the jury that Finis Cassiday did fall or crawl from the wagon to the ground as a result of being shot with a shotgun was unwarranted by the evidence, as there is no such evidence."

The defendant himself testified as follows:

"At the second shot they both went out of the wagon. The old man seemed to be knocked out; that is, I thought he was hit somewhere, fatally perhaps. The boy, he went out. They both went out at the same time. The boy partly fell and partly jumped out, and got on the ground and run to the back end of the wagon, and came around just around the wheel. I could see his head and arms, all of the body I could see, and fired from there."

Counsel for the defendant in their brief proceed as follows:

"There was no other testimony, and there could be no other, as the defendant was the only witness present, and yet this instruction absolutely states a condition to be a fact that is not within the lids of this record, and tells the jury that under this said condition it would be murder."

Counsel for defendant have fallen into the error of assuming that, because defendant was the only eyewitness to the kiling, the instructions of the court should have been confined to his testimony alone. The charge excepted to was applicable to the theory of the prosecution, based upon circumstantial evidence, and the physical facts of the case as presented by the body of the deceased and the natural objects surrounding the place where the body of deceased was found immediately after the commission of the offense. When we come to discuss the testimony of the case, it will be found that there is ample evidence in the record to support this instruction. It is not contended by counsel that the proposition of law contained in the instruction is not correct. The only objection is that the instruction given is not applicable to the testimony of the defendant. We could not sustain this objection without holding that the trial court is limited in instructing the jury to the testimony of the defendant.

The trial court instructed the jury upon the law of the case applicable to the testimony of the defendant as follows:

"No. 10. If, after Finis Cassiday was out of the wagon, he kept shooting at the defendant, or was making such demonstrations with a revolver as to induce in the mind of the defendant the reasonable apprehension that he was in imminent danger of losing his life or of suffering some great personal injury, and he fired the shot from his revolver which killed Finis Cassiday, believing it necessary for his own safety, then such killing was justifiable, and your verdict should be not guilty."

As no exception was reserved to this instruction, we must assume that it was satisfactory to the defendant. It is therefore not necessary for this court to pass on or discuss it.

Seventh. The defendant requested the court to give the following instruction:

"No. 12. The court instructs the jury that evidence of good character is competent evidence in favor of a party accused, as tending to show that he would not be likely to commit the crime alleged against him, and in this case, if the jury believe from the evidence that prior to the commission of the alleged crime the defendant had borne a good reputation as a quiet, peaceable and law-abiding citizen among his acquaintances and in the neighborhood where he lives, then this is a fact proper to be considered by the jury, with all the other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or truthfully; and if, after a careful consideration of all the evidence in the case, including that bearing upon his previous good character, the jury entertain any reasonable doubt of the defendant's guilt, then it is your duty to acquit him."

The defendant reserved an exception to the refusal of the court to give this instruction. All of the authorities hold that evidence of the good character of a defendant as a peaceable, law-abiding citizen is relevant and admissible as evidence in his behalf in cases of homicide; but there is a conflict in the authorities as to the duty of the court with reference to instructing the jury on this class of evidence.

In *Heard v. State*, 9 Tex. App. 1, the court said:

> "It is also urged that, inasmuch as the defendant had introduced evidence of previous good character, the jury should have been instructed as to the effect of such testimony. The judge, by admitting the evidence to the jury, authorized them to consider it; to have done more would have been to invade the province of the jury, who are by law the exclusive judges of the weight to be given to the testimony. It was beyond the power of the court to tell the jury how much weight they should attach to the evidence of good character."

In *Pharr v. State*, 9 Tex. App. 137, the court said:

> "It was not incumbent on the judge to give a special instruction on good character. The law permits one accused of crime to put his previous good character before the jury for their consideration. All the court is required to do is to permit the evidence to go to the jury, to be by them considered in connection with the other testimony in the case, in order to determine from the whole evidence the guilt or innocence of the accused."

Upon the other hand, many courts hold that the better practice is for trial courts to instruct the juries upon the question of character, when this issue is presented by the evidence. An examination of the reported cases will show that it is generally held that when an instruction on the subject of character is given, showing the purposes for which it may be considered by the jury, favorable to the defendant, it should be qualified with the further statement that if, notwithstanding the good character of the defendant, the jury should be convinced of his guilt beyond a reasonable doubt, then this character would not avail him as a defense, and they should convict him. This is the undoubted law; otherwise Judas did not betray Christ, and Benedict Arnold did not become a traitor to his country. For, prior to the commission of their crimes, these twins in infamy could each have proven a character above reproach by the most credible witnesses. For the qualification which is placed by most courts upon the subject of character, see 2 Thompson on Trials, § 2444, and authorities there cited.

We are of the opinion that it is proper for courts to charge on character, but, in doing this, care should be taken to avoid the objections pointed out by the Texas Court of Criminal Appeals, upon the one hand, and the necessity for the qualifications and limitations required by other courts. Our idea of a correct instruction upon this subject is expressed by the Supreme Court of the United States in the case of *White v. United States,* 164 U. S. 100, 17 Sup. Ct. 39, 41 L. Ed. 365. Justice Peckham there said:

> "When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character. and give such weight to it as they saw proper, under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient."

We recommend to trial judges in this state to make the remarks of Justice Peckham the basis of their instructions upon character, and then there will be no danger of committing error.

It is argued by some authorities that an instruction upon good character rests upon the same ground and should be as full and mandatory as an instruction upon alibi. The fallacy of this position lies in the fact that an alibi directly controverts the allegation of the commission of the crime by the defendant. If the alibi is sustained, it is demonstrated that the defendant did not and could not have committed the crime. A doubt upon the issue of an alibi is necessarily a doubt as to the guilt of the defendant. Good character may be proven beyond all reasonable doubt, and yet the defendant may be guilty. An alibi goes directly to the question of guilt, and, if sustained, is a complete defense to an accusation of crime. Good character is not a defense to a crime; at best it is only a fact or circumstance, like any other fact or circumstance not going directly to the question of guilt, from which the jury may or may not draw inferences favorable to the defendant in the light of all the other testimony in the case. Therefore the same necessity for an instruction upon character, and the same fullness, not required as is necessary upon the question of alibi. We therefore hold that if the jury are instructed that it is competent for the defendant to offer evidence of previous good character, and that the jury may consider such evidence of good character, and give it such weight as they see proper, under all the evidence in the case in connection with the law of reasonable doubt, such an instruction is not only all that is necessary, but is as far as the court should go.

The instruction requested and refused in this case went too far in directing the jury as to the purposes for which evidence of good character should be considered by the jury in a manner favorable to the defendant, and, having done this, it is defective in omitting to state the qualifications hereinbefore mentioned favorable to the prosecution. There was no error in the action of the court in refusing to give the special instruction requested. This being true, what was the duty of the court as to giving a correct instruction upon this question? We do not approve the rule heretofore announced by the Supreme Court of Oklahoma Territory, to the effect that if the court refuses to give an instruction requested, upon the ground that it is erroneous, the court is not required to give a correct instruction covering the same subject, if it is presented by the evidence in the case. We think that common fairness requires that when the attention of the court is called to an omission to instruct the jury upon some question of law applicable to the evidence in a case, and a request is made for such an instruction, the court should give the requested instruction, if it is correct. If the requested instruction is not correct, then the court should either modify it or should refuse it, and give a correct instruction to the jury in its place. In this case the court failed to give the jury any instruction at all upon the question of character. Six witnesses testified to the previous good character of the defendant. This being the condition of the record, what is the duty of this court in the premises? An answer to this question will require a consideration of two legislative enactments of Oklahoma.

Wilson's Rev. & Ann. St. 1903, § 5144, is as follows:

> "(5144) § 8. The rule of common law that penal statutes are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice."

Technical rules and distinctions certainly cannot stand upon higher or stronger ground than statutes. If we are to construe all statutes liberally, and with a view to promote their objects and in furtherance of justice, are we not bound to apply the same rule of construction to technicalities?

Wilson's Rev. & Ann. St. 1903, § 5618, is as follows:

> "(5618) § 482. On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

This statute has been frequently construed by the Supreme Court of Oklahoma Territory. In *Jones v. Territory,* 5 Okla. 536, 49 Pac. 934, the defendant was prosecuted by information in the county court of Oklahoma county for permitting gaming tables to be set up and used for the purpose of gambling in a house occupied by the defendant. By agreement of the parties this case was certified to the district court of said county for trial. The transcript from the probate court shows that a date was set for the arraignment and receiving the plea of the defendant, but fails to show that the defendant was ever arraigned in said court, or ever entered a plea of not guilty therein. After being convicted in the district court, the defendant filed a motion for a new trial, and brought the case to the Supreme Court upon the ground that the district court had no jurisdiction to try the cause, for the reason that the defendant had not been arraigned, and that a plea of not guilty had not been entered in said cause before said cause had been transferred from the probate court. The court said:

> "We are of the opinion that under this section (5618) the omission of the probate court to require the defendant to enter a plea of not guilty, before making an order transferring the cause to the district court, could not affect the substantial rights of the defendant, and therefore is not ground for disturbing the judgment."

In a case in the state of Kansas, where the defendant was charged with burglary and grand larceny, and it was conceded that the defendant was not arraigned and did not plead to the information, it was held by the Supreme Court, on appeal, that, under a statute identical with ours above quoted, such omission did not affect the substantial rights of the defendant or justify disturbing the judgment. *State v. Cassady*, 12 Kan. 561.

In the case of *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314, the court said:

> "In the absence of any suggestion of fraud or misconduct on the part of the officials whose duty it is, under the statute, to make selections of persons to perform jury service, other than the mere failure to observe the regulations of the statute, and in the absence of any suggestion that a failure to comply with any such statutory regulations could injuriously affect the substantial rights of parties, an appellate court will not reverse the action of a trial court in overruling a challenge to the array based upon a failure to comply with some of the regulations of the statute relating to the selection of juries. *State v. Carney*, 20 Iowa, 82; *Friery v. People*, 54 Barb. 319; *Ferris v. People*, 35 N. Y. 125; 12 Am. & Eng. Enc. Law, 328."

In the case of *Boggs v. U. S.*, 10 Okla. 440, 63 Pac. 973, the court said:

"* * * We are unable to see how the rights of the defendant have been jeopardized or his interests unfavorably affected by the remarks of the court to the jury; and by the Statutes of Oklahoma of 1893, § 5330 (Criminal Procedure), it is made the duty of this court on appeal to give judgment without regard to technical errors or defects, and not to consider exceptions which do not affect the substantial rights of the parties; and as on an examination of the entire record we are unable to see how these remarks of the court could in any way have prejudiced or affected the rights of the defendant, this assignment of error cannot be sustained, as we take the rule to be well established that, when a statute in express and unequivocal terms declares that judgment shall be given without respect to error or objection that does not affect the substantial rights of the parties, it must be made to appear to the court that the substantial rights of the complaining party were unduly prejudiced before the judgment will be reversed."

So it is seen that the common-law rule as to a strict construction of penal laws has been directly repealed by the Legislature, and is not in force in this state, and that on the contrary it is by statute made the express duty of this court to construe all laws liberally and in furtherance of justice, and that this court is positively forbidden to reverse any conviction upon technical errors or defects or exceptions which do not affect the substantial rights of the defendant. It is therefore our duty to examine the entire record before passing upon any technical question or exception, and determine as to whether or not it could have affected any of the substantial rights of the defendant.

In this case the defendant was the only eyewitness to the difficulty which resulted in the death of P. W. Cassiday and Finis Cassiday at his hands. The evidence for the prosecution was therefore entirely circumstantial. We will only be able to give a condensed statement of the material facts. The defendant had rented the farm, upon which the homicide occurred, to P. W. Cassiday. The lease had expired, and Cassiday had removed all of his property from the farm, except two cows, a buggy, and a box of goods. On the morning of the homicide, P. W. Cassiday, with his two sons, Finis Cassiday and Walter Cassiday, returned to the farm in a wagon, with high sideboards on it, to get the property yet belonging to him as above described. Walter Cassiday testified that the defendant came to the farm while his father was feeding his horses, that defendant drove his wagon by the side of a haystack; that P. W. Cassiday, Finis Cassiday, and witness were at their wagon eating their dinner. The defendant climbed upon the haystack, and threw down a few bundles of hay, and then came down and got on his (defendant's) wagon and picked up his gun. It was a double-barreled shotgun. Witness was sent by his father to carry a rope to a neighbor. When witness left, Finis Cassiday was sitting on the side of the wagon bed, with his feet hanging outside, and his right side, or back, to defendant, and was fixing a halter. P. W. Cassiday was sitting on the front end of the wagon with a halter in his hands. When witness had gone some distance, he heard two shots fired. They sounded as if they came from the place where he had left the parties above described. They were shotgun shots. Some of the shots passed witness, and knocked up the dirt in a field beyond him. Witness looked back, but, an orchard being between him and the place where the parties were, he could not see them. Witness went on to the place where he had been told to carry the rope, and then came back. He met defendant and a man named Wing. Defendant was in his wagon. Wing was walking behind the wagon. Wing got in the wagon and drove off with defendant. Witness went back to where he had left his father and brother, and found them both dead. P. W. Cassiday was lying in front of the wagon, just under the place where he was sitting when witness left him. Finis Cassiday was lying to the side of the wagon, just outside of the place where he was sitting when witness left. His head was to the west and out from the wagon. Right by his side there was a pile of rocks. There was a hole in the back of the head of Finis Cassiday; brains and blood were oozing out.

Dr. Hazen testified: Examined body of Finis Cassiday. Found a gunshot wound on the left jaw, glancing up and coming out near the nose. One shot about half an inch to the right of the nose, and half an inch below the eye. Did not find where it came out. One shot through the muscle of the arm, halfway between the elbow and shoulder. They were buckshot holes. There was another wound made by a .38 pistol, in the back of the head, which went clear through and lodged under the skin at the bridge of the nose. The effect of the wounds which appeared to have been made by the buckshot would ordinarily be to render a man practically helpless for a few minutes—probably knock him down and stun or paralyze him for a few moments. It would have been impossible for the wounds in the face and arm of the deceased to have been made by shot of the same size as the one that entered the back of his head.

Louis Conner heard shots of the difficulty. First, two shots were heard. They were close together. Afterwards, heard other shots. They were lighter than the first two.

W. W. Bright testified: Reached place of homicide about 2 o'clock. Picked up some shells about 50 feet from Cassiday's wagon, and south and east.

T. P. Alford testified: Saw signs where bullet marks were made on a rock, and an old wagon bolster near a pool of blood where Finis Cassiday's body was found. Also saw where bullets had cut hedge about two feet from ground near there.

Alva Cable testified: Saw the defendant a week before the killing. Defendant said that the Cassidays had been abusing him, and that if they cursed him any more he would give them something they could not carry away. Defendant had two shotguns and a Winchester with him just before the killing.

Mrs. W. P. Cassiday testified that Finis Cassiday was 17 years old at the time of his death. That in January witness saw defendant make an attempt to shoot Finis Cassiday. Witness spoke to defendant, and he desisted. Alfred Wing was with the defendant, and also had a gun. It was proven that the wagons of defendant and deceased were about 24 feet apart at the time of the tragedy. There were no marks on natural objects of any shots coming from the direction of the wagon of the deceased and toward the wagon of the defendant. All of the marks upon natural objects were of shots coming from defendant's wagon and toward the two Cassidays, and those around Finis Cassiday were all fired toward the ground where Finis Cassiday lay. Venue was proven. Territory rested.

Alfred Wing testified: Heard the shots. Went to the place of killing. Saw defendant. Saw two dead men, and close to Finis Cassiday lay a revolver. Witness picked it up, and put it in his pocket. Four chambers of the pistol were empty. Helped defendant hitch up his team, and left with him.

Defendant, being sworn, testified: Went to farm on day of homicide for some hay. Reached place and found P. W. Cassiday and sons there. Drove up to haystack; threw some bad hay off in a pen; got down and sat on his (defendant's) wagon.

"I moved my gun from the haystack and placed it on the wagon by me. I was sitting there whistling and patting my hands. The Cassidays were in their wagon. Walter Cassiday had gone off. Finis Cassiday said, 'The God damned old beef-eater seems happy.' P. W. Cassiday said, 'Yes,' and the old gentleman then spoke to me, and says, 'We are going away now, and you need not be lying around on us any more, telling that we have tore up your things and broke out your window lights. and so on.' And I hadn't yet spoke to them. And I says, 'Then, if you are going away, I would like for you to put in those window lights that you broke out, anyway.' And he says, 'I have already done that, I thank you, sir.' 'Well,' I says, 'I beg your pardon; I didn't know it was done; I suppose you have done it today?' And he says, 'No, I done it several days ago.' 'Well,' I says, 'it wasn't done yesterday, for there were five of them broken out; I was there and had a man with me.' And he says, 'If they were broken out, you broke them yourself.' And I told him that I did not, and Finis, at the same time, was talking, both cursing at the same time. Q. Well, just tell the language they said and used. A. And the old man, as he said that, if they were broken out that I had broken them out, and I told him I had not, and he says, 'You are a damn liar,' and shook his fist at me, with a knife in his hand. He was boring at the time he was talking, in that way (indicating), and he says, 'You have run over us just as long as you are going to,' and Finis says, 'The damned son of a bitch won't do it any more,' and he raised then, with his gun in his hand, and just at that time I jumped to my gun, and he come up with his gun, and the old man says, 'Damn him, shoot him,' as he started to raise, and the shooting commenced. Q. Well, who shot first? A. Finis shot first. Q. And then what happened? A. Well, he shot, and I got to my gun that was laying on the hay, just as quick as I could, and throwed both hammers back, and by that time he had got in about two shots, and as I brought my gun up I hollered at him to drop that gun, and fired. Q. Did you fire one or two shots? A. I fired two shots. Q. What was the result? A. The first shot, if it took effect, I didn't know it. I never have thought that it did. At the second shot they both went out of the wagon. The old man seemed to be knocked out; that is, I thought he was hit somewhere, fatally perhaps. The boy, he went out. They both went out the same time. The boy partly fell, and partly jumped out, and got on the ground and run to the back end of the wagon, and come around, just around the wheel; I could see his head and arms, all of the body I could see, and fired from there. Q. What did you do then? A. I jerked my revolver, and jumped to a southwest direction, just as fast as I could run in that—not exactly towards him, but a little to the south, firing with my revolver. Q. Did you go right on by him, firing as you went? A. Yes; well, I don't suppose I was firing; I think he fell before I had got even due south of him. Q. And then where did you go? A. On up about halfway to the house from there. Q. How many shots had you fired from the revolver when he fell, if you know? A. I don't know; I never did know."

Mrs. Eaton testified: "In July, 1905, I heard Finis Cassiday say to defendant, 'You are a God damned son of a bitch, and I will get you yet.'"

Miss Jessie Morris, daughter of defendant, testified as did Mrs. Eaton.

Clay Morris, son of defendant, testified that the pistol claimed to have been picked up by Wing belonged to Finis

Cassiday, and that he had heard Finis say that he would get the defendant yet.

Green Hill, son-in-law to defendant, testified that he heard Finis Cassiday say that he would knock the "hell-fired brains out of" defendant, and would kill the old "s. of a b." if it took him all summer.

Witnesses were then introduced in behalf of defendant's good character for peace. It was developed on cross-examination that he had been involved in difficulties with others besides the Cassidays. Defendant rested.

H. Thompson, being introduced by the prosecution in rebuttal, testified that a few hours after the shooting defendant told him, in describing the difficulty, that "they were coming at him with a knife and a gun, and that he got behind the wagon to protect himself, and that when they got in shooting distance he shot at them."

Otis Snigs testified: That the defendant's witness Wing had told him that the Cassidays had about got defendant bluffed out, and that he and defendant loaded up their guns and went out and commenced to break stalks. The Cassiday boys started toward the field, and defendant took his gun and started toward them, and he, Wing, stopped him. This was admitted solely for the purpose of impeaching Wing.

W. T. Feagin testified that about the 1st of February, before the homicide, the defendant's witness, Wing, told him that he, Wing, and defendant were going out to the farm, and if the Cassidays were there they would kill them.

Grant Kimmel testified that the reputation of the defendant for peace was bad.

G. H. Durr, C. A. Brewster, and J. B. Condit testified to the bad character of defendant for peace.

Albert Cassiday testified that the pistol claimed to have been picked up by Wing, near the body of Finis Cassiday, did not belong to Finis.

J. C. Fagan testified that the Saturday after the killing he heard defendant say that he saw the Cassidays coming around through the gate near the back end of the wagon; that he then got down from the stack, onto the wagon, and picked up his gun; that the Cassidays got into their wagon and commenced to eat their dinner; that he, defendant, let on that he was fixing his gun—the breech of it; that P. W. Cassiday was coming at him with a knife, and that then he shot.

There are hundreds of pages of irrelevant evidence in the record, but the above is a brief statement of the material evidence in the case.

From the testimony of the physician it is evident that when Finis Cassiday was shot, and fell or tumbled, jumped, or crawled from the wagon, he was in a helpless condition. The marks of bullets on the rocks and other natural objects around where Finis lay on the ground show conclusively that the defendant fired upon a prostrate and helpless boy. These evidences of where the bullets struck, mute and inanimate though they are, speak in terms more eloquent and conclusive than human words can express, and confirm the testimony of the physician, and place beyond controversy the fact that defendant did not fire at a fighting man, facing him at the rear of the wagon, as he testified, but that he shot a boy who was already down, and helpless, and shot him in the back of the head at that. It was his own hand that placed these bullet marks upon these rocks and other inanimate objects around the fallen body of Finis Cassiday. The pistol, true to his bidding, sent a bullet crashing through the brain of the deceased, but the same bullet which carried out his purpose rises up and condemns him, and says: "Finis Cassiday was not facing and fighting you, for I entered the spot at which you aimed me, and it was the back of his head; and the other bullets that you fired went where you sent them, all around the body of a boy lying upon the ground."

The previous threats of the defendant, as well as his statements made just after the homicide, cannot be explained except upon the ground that he is guilty of murder. Witness heard the shots—they came first from a shotgun. The deceased did not have a shotgun. The only shotgun there was in the hands of the defendant. In the face of this record, we are asked to reverse this conviction because the court did not instruct upon the question of character. The evidence of character was by no means clear. It was as much against as in favor of the defendant.

The entire record in this case covers 1,072 pages. We have patiently gone through with every word of it, and given each proposition the best attention of which we are capable. The evidence of character of the defendant, both for and against him, was before the jury. They were correctly instructed that the presumption of innocence and the doctrine of reasonable doubt were applicable to all of the evidence in the case. It would have been better for the court to have given an instruction upon character, embodying the views expressed by the Supreme Court of the United States in *White's Case*, hereinbefore quoted and approved. In some cases, it might be reversible error to fail to give such an instruction; but our statute requires us to construe laws liberally and in the furtherance of justice, and forbids us from reversing a conviction upon a technical error or an exception that does not affect the substantial rights of the defendant. In this case we do not believe that an intelligent and honest jury could be found, who, with a due regard for their oaths, and the testimony and the law, could ever come to any other conclusion than that the defendant was guilty of murder. Under the statute, above quoted, and after a consideration of the entire record, we are constrained to hold that in this case reversible error was not committed by failure of the court to instruct the jury upon the question of character.

Next to honor, human life is the most sacred thing upon this earth. He who intentionally takes this life must be held responsible for his act, and can only be justified upon the ground of necessity, and this necessity must not be the result of his own intentional wrongdoing or willful carelessness. While he is justifiable in acting upon reasonable appearances of danger, yet he must take care and see that he acts upon such reasonable appearances, and not as the result of his own unlawful and wicked passions. The sooner that desperate and lawless men learn that human life has ceased to be the cheapest thing in Oklahoma, the better it will be for them. They must control their passions or suffer the just penalties of violated law. In order that this improved condition may be made permanent, juries must be careful, firm, and fearless in the discharge of their duties, and courts must uphold their verdicts when it appears from the record that they were rendered upon sufficient evidence and were fairly obtained, and that the defendant was not deprived of any of his substantial rights. These things are necessary for the well-being of society and the protection of the people in the peaceable enjoyment of life, liberty and the pursuits of hapiness. Finding that all of these conditions were met and complied with in this case, there is nothing left for this court to do except to approve and affirm the verdict of the jury and the sentence of the court.

The judgment of the lower court is, therefore, in all things affirmed.

BAKER and DOYLE, JUDGES, concur.

ON MOTION FOR REHEARING.

Denied April 10, 1909.

PER CURIAM. The third ground relied upon to secure a rehearing is as follows:

"Third. That the judgment of this court in this cause is in direct conflict with the judgment of the court in the case of *Price v. State*, in which the opinion of the court was rendered by Presiding Judge Furman on the 11th day of November, 1908, in which opinion the court declares that a man can scarcely be supposed within 90 seconds from the fall of his victim to have deliberated with himself and formed a premeditated design to effect death, and in the case at bar the appellant had been acquitted of the charge of killing the father of the deceased, a few seconds before the homicide charged in this cause, and that the appellant was defending himself against the assault of the deceased in this case, and therefore by that finding must have found that he had not effected a premeditated design to kill, prior to the killing of P. W. Cassidy, for which the appellant was acquitted, and the record being clear that there was not to exceed 30 seconds intervening between the killing of P. W. Cassidy and Finis Cassiday, the deceased, for whose killing the appellant was found guilty in the lower court, this court, by the judgment in this cause, found that the appellant might have been guilty of murder in the first degree, with but one-third of the time to deliberate that was held in the case of *Price v. State,* was not sufficient time to effect a premeditated design to commit murder, if the person had been warranted in taking life."

The *Price Case, ante,* p. —, 98 Pac. 447, did not involve the issue as to the sufficiency of time in which the defendant could form a premeditated design to kill the deceased. No such question was presented to or passed upon in that case; the issue was as to whether certain declarations, not of the defendant, but made by the deceased, were admissible in evidence as a part of the *res gestae.* The record in the *Price Case* discloses that the statements offered in evidence were made within one minute after the fatal shot was fired, and while deceased was lying where he had been shot down, and was unable to get up, with the blood flowing from his wound, and while he was suffering from the shock of the wound.

Under these conditions this court did hold that the statements then made by the deceased were spontaneous declarations, and as such were properly admitted in evidence on behalf of the prosecution. In support of this holding, quotations were made from a number of authorities showing the extent to which the courts had gone in admitting declarations as a part of the *res gestae.* Among others, the case of *Mitchem v. State,* 11 Ga. 615, was cited. The language upon which counsel for the defendant relies will be found in this quotation. An examination of this quotation will show that it does not sustain the contention of counsel for defendant. It was dealing alone with the admission of evidence as *res gestae.*

The opinion quoted from places special emphasis upon the distressed and agitated appearance and manner of the witness, as the basis upon which his testimony was admitted. The rules of law for the admission of evidence and those governing the jury in the consideration of evidence are not always the same, but, even if they were, the quotation in the *Price Case* would not be authority in this case, for the grounds underlying the rule there do not appear in the record of this case.

Just as the spokes of a wheel point to the hub, so the evidence in this case points to deliberate action on the part of the defendant in taking the life of the deceased. It is doubtless true that the defendant was angry, but there is no evidence in the record which indicates that he was laboring under such excitement as would reduce the killing from murder to manslaughter. If there had been such evidence in the record, then it would have been the duty of the court, under the other facts in evidence, to have instructed the jury upon the questions of cooling time. But we fail to find such evidence in the record. The trial court, therefore, did not err in refusing to submit this issue to the jury.

To discuss in detail the other grounds relied upon for a rehearing would be but to reiterate what has been said in the original opinion. Counsel for the defendant are to be commended for the zeal with which they have represented their client. They have raised every question which ingenuity could suggest, and have sustained their propositions with signal ability.

We have gone carefully over the entire case, and have failed to find any ground upon which we would be justified in changing our original opinion. The motion for a rehearing is therefore denied.

WILLIAM SCHWEDES V. STATE.

No. 46. Opinion Filed February 4, 1909.

INTOXICATING LIQUORS—Interstate Commerce. Under subdivision 3, sec. 8, art. 1, of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, a resident of one state has the right to have shipped to him from another state alcoholic liquors, when ordered by him for his and his family's use, and to keep the same for such use; and the state cannot, under its police power, enact laws so as to substantially hamper or burden such constitutional right to have such shipment made and to receive and retain the same for personal use.

(Syllabus by the Supreme Court.)

Error from County Court, Grant County; H. H. Rogers, Judge.

Sam P. Ridings, for appellant.

Fred S. Caldwell, for the State.

BAKER, JUDGE. The record discloses the fact that there was involved in this case a construction of the clause in the United States Constitution, commonly known as the "Interstate Commerce clause". The law creating this court contains the following provisions:

"If in any cause appealed to the Criminal Court of Appeals, in which the construction of the Constitution of this state, or of the United States, or any act of Congress is brought in question, the said Criminal Court of Appeals shall certify to the Supreme Court of the state, the question involving the construction of the Constitution of this state, or of the United States, or any act of Congress, for the final determination of the question so certified. Thereupon all further proceedings in said cause in the Criminal Court of Appeals shall await the decision of the Supreme Court upon such question. Upon the final decision of such question by the Supreme Court, said Supreme Court shall certify its decision on such question to the Criminal Court of Appeals, and said decision of such question by the Supreme Court shall govern said Criminal Court of Appeals."

In conformity with this section of the statute, the constitutional question involved in this case was certified to the Supreme Court for its determination. In answer to this certificate we have received the following opinion of the Supreme Court:

On certificate from the Criminal Court of Appeals.

William Schwedes was convicted of conveying intoxicating liquor from one place in the state to another, such liquor not having been lawfully purchased as authorized by the Constitution of the state, and he brought error to the Criminal Court of Appeals which court certifies the question to the Supreme Court as involving the construction of Const., art. 1, § 9 (Bunn's Ed. § 499), prohibiting the shipment or conveyance of intoxicating liquor from one place in a state to another, except the conveyance of a lawful purchase. Reversed.

This cause was certified from the Criminal Court of Appeals to this court, as involving the construction of that part of the Constitution of the state of Oklahoma which prohibits the shipment or conveyance of intoxicating liquors from one place in the state to another place therein, except the conveyance of a lawful purchase. Section 499 of Bunn's Edition of the Constitution (section 9, art. 1, of the Constitution; Gen. St. Ann. Okla., 1908, p. 76).

The plaintiff in error was convicted on the 30th day of December, 1907, in the county court of Grant county, in a prosecution by information which charged that he, the defendant in the trial court, did on the 20th day of December, 1907, in Grant county, unlawfully and willfully carry and convey certain intoxicating liquors, to wit, 12 quarts of whiskey, from one place in said state, to wit, the depot of the Chicago, Rock Island & Pacific Railway Company, in Pond Creek, in Grant county, to another place in said state, to wit, the livery barn of said Schwedes in Pond Creek, said liquor not having been lawfully purchased as authorized by the Constitution of the state of Oklahoma.

The defendant in said court asked for several instructions, which were refused by the court, in words and figures as follows, to wit:

"No. 7. If you find the liquor charged to have been carried by the defendant had just been imported by a common carrier, from some person in another state of this Union, and that the same was imported for the personal use of the defendant, then the defendant had a right to receive and carry and convey the same to his own house or apartment, in the original package, for his personal use, as long as there was no intent on his part to sell or dispose of the same contrary to law, or to put the same to an unlawful use." "Refused: Exception to defendant. H. H. Rogers, county Judge."

"No. 8. If you find that the liquor which was charged to have been carried by the defendant was in the original package and the property of the defendant, and had been imported from another state or foreign country by a common carrier for his own personal use and consumption, and not for the purpose of sale, barter, or exchange, then you should find the defendant not guilty." "Refused: Exception to defendant. H. H. Rogers, County Judge."

"No. 10. You are instructed that if you find that the defendant did carry the intoxicating liquor charged in the information, and that the same was imported from a foreign state or country, for his own use and consumption and not for the purpose of barter, sale or exchange, then the defendant had a right to receive the same and carry it to his own apartments, in the original package that it was shipped in, so long as he did not convey same for any other use." "Refused: Exception to defendant. H. H. Rogers, County Judge."

These instructions were based upon the testimony of the defendant himself, which is substantially to the effect that he had gotten a box of liquor at the depot at Pond Creek, and had started to take it to his home, and whilst he was on his way thereto he was arrested by the sheriff of Grant county and taken to his livery barn, where the box was opened and the contents seized by the officer; that the liquor he was carrying was shipped to him by Stulz Bros., liquor dealers, at Kansas City, Mo., that said liquor was shipped to him by said Stulz Bros. in the pursuance of an agreement had with a salesman in the employ of said Stulz Bros., who stated to said defendant that he wonld send him something to drink Christmas; that he got the liquor for himself and family, for their own use, for a "Christmas drink," as said by the defendant.

The requested instructions on the part of the defendant in the trial presented the question of the right of a person to purchase in good faith for his own use, intoxicating liquors in a foreign or another state, and have same sent to him by express or other means of transportation, and whether the consignee might go to the express office or depot and receive the liquor so purchased and carry same to his residence for his use.

The refusal of the trial court to give the instructions requested is assigned as error in the Criminal Court of Appeals, and it was considered by that court that the construction of the Constitution is brought into question, and this proceeding is by virtue of the provisions of section 2, art. 1, c. 28, p. 291, of the Session Laws of Oklahoma, 1907-08 (section 2214, art. 12, Gen. St. Ann. Okla., 1908) certified to this court.

WILLIAMS, C. J. (after stating the facts as above). It is insisted by the plaintiff in error that the portion of the prohibition article which provides that "any person, * * * who shall ship, or in any other way, convey such liquors from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized, shall be punished, * * *" is repugnant to the third clause of section 8, art. 1. of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, wherein the power is delegated to the Congress of the United States to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Under the provisions of said prohibition article, there is an attempt to prevent all persons from shipping, or in any way conveying, intoxicating liquors from one place within this state to another place therein, except a purchase from the state agency. On the part of the defendant in error, it is insisted that that portion of the act of Congress approved August 8, 1890, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," otherwise known as the "Wilson Act" (Act. Aug. 8, 1890, c. 728, 26

Stat. 313 [U. S. Comp. St. 1901, p. 3177]), permits the adoption and enforcement of said provision in the prohibition article. It reads as follows:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the law of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In the case of *Vance v. Vandercook Company,* 170 U. S. 452, 18 Sup. Ct. 679, 42 L. Ed. 1100, Mr. Justice White, in delivering the opinion of the court, said:

> "But the right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right, or they do not. If they do, * * * then they are void. If they do not, then there is no lawful ground of complaint on the subject. We are thus brought to examine whether the regulations imposed by the state law on the right of the residents of other states to ship into the state of South Carolina alcoholic liquor to the residents of that state, when ordered by them for their own use, are so onerous and burdensome in their nature as to substantially impair the right; that is, whether they so hamper and restrict the exercise of the right as to materially interfere with or, in effect, prevent its enjoyment."

The court further said, on page 456 of 170 U. S., page 681 of 18 Sup. Ct. (42 L. Ed. 1100):

> "Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law to be valid must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment."

In the case of *Heyman v. Southern Ry. Co.,* 203 U. S. 277, 27 Sup. Ct. 107, 51 L. Ed. 178, Mr. Justice White, in delivering the opinion of the court, said:

"And in this case we deal only with the power of the state to enforce its police regulations against goods of the character of those enumerated in the Wilson act, the subject of interstate commerce, before delivery. We must not be understood as in any way limiting or restricting the ruling made in *Vance v. Vandercook Co.,* * * * upholding the right of a citizen of one state to bring from another state into the state of his residence, and keep therein, for his personal use, the merchandise referred to in the Wilson act. In other words, as in the case at bar, delivery had not taken place when the seizures were made, and the control of the state over the goods had not attached. We are not called upon to consider whether, if the power of the state had attached by delivery; the state might not have levied upon the gooods on the charge that they had not been *bona fide* brought into the state, and were not held by the consignees for their personal use, and therefore, were not within the ruling in *Vance v. Vandercook.* * * *"

The principle of law covered by the instructions was within the rule as announced by Mr. Justice White in *Vance v. Vandercook Co.*, and *Heyman v. Southern Railway Co., supra,* in construing said part of the Wilson Act and the interstate commerce clause of the Constitution.

It is not essential for the decision of this case that we pass upon the following questions: (1) After delivery has been made by the carrier to the consignee, under the laws in Oklahoma, can the state levy upon said goods on the charge that they have not been *bona fide* brought into the state, and held by the consignee for his personal use or that of his family? (2) Although such goods may not be brought into the state for the personal use of the consignee or his family, but for the purpose of sale, which is prohibited under the state law, can such consignee be prevented from receiving and transmitting the same to his home, place of business, or storage house? These questions are reserved.

The instructions are at all events sufficiently favorable to the state. It follows that the instructions numbered 7, 8, and 10, requested by the defendant in the trial court, should have been given.

All the Justices concur.

In compliance with the statute hereinbefore quoted, and as decided by the Supreme Court, this case is reversed and remanded.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

NICK ARIE V. STATE.

No. 11. Opinion Filed February 20, 1909.

(100 Pac. 23.)

1. **INTOXICATING LIQUORS—Constitutional Law—Adoption of Constitutional Provisions—Submission to Vote—Presumption of Regularity.** The prohibition article, which was separately submitted with the Constitution for ratification or rejection, the party assailing the same failing to point out in what particular it was not properly submitted in accordance with Enabling Act June 16, 1906, c. 3335, 34 Stat. 267, it having been declared adopted and accepted and recognized by the political departments of both the federal and state governments, will not be declared by the courts invalid, on the ground that it was not properly submitted or adopted.

2. **INTOXICATING LIQUORS—Constitutional Law—Construction—Similar Language in Different Provisions—Obligation of "Contracts"—License—Schedule of Constitution—Repeal of Law Authorizing License—Effect.** It was the intention of the framers of the Constitution that the prohibition provision, required to be incorporated therein by virtue of paragraph 2, sec. 3, Enabling Act June 16, 1906, c. 3335, 34 Stat. 269, should be enforceable in the courts of the state immediately upon the admission of the state into the Union.
2a. Such provision was incorporated in section 7, art 1 (Bunn's Ed. sec. 9) by the framers thereof with a like intent.
2b. The prohibition article (Bunn's Ed. sec. 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162) was submitted as a separate proposition, with the intention that it should become effective over the entire state in like manner, if approved by the people and the Constitution was also ratified.

2c. A license issued under a general statute to a dealer in liquors is in no sense a "contract" between the state and the licensee, and is not protected by the contract clause of the federal Constitution, being a mere permit which may be modified, annulled, or revoked at the pleasure of the legislative power.

2d. A schedule to a Constitution generally contains temporary provisions for the preparatory machinery necessary to put the principles of the government under the Constitution in motion without disorder or collision, not as a rule to control the principles of the organic law, or to limit the same, but to carry the whole into effect without break or interval.

2e. The laws licensing the liquor traffic (article 1, c. 49, Wilson's Rev. & Ann. St. 1903), at the time of the admission of the state into the Union, were repugnant to the provisions of the prohibition article thereof, and were not extended to, and did not remain in force in, said state.

2f. A license to carry on the liquor traffic is revoked or annulled by the repeal of the law authorizing the granting of such license.
2g. A liquor license, the period for which it was issued not having expired when the state of Oklahoma was admitted into the Union, was revoked and discontinued on the admission of said state; the prohibition article thereof becoming then and there effective.

(Syllabus by the Supreme Court.)

1. It is not necessary that indictments, informations or affidavits shall, upon their faces, show that they are being prosecuted in the name and by the authority of the state. It is sufficient if this appears from the record.

(Syllabus by the Criminal Court of Appeals.)

Error from County Court, Comanche County; James H. Wolverton, Judge.

James F. Steck and *Stevens & Meyers,* for plaintiff in error.

W. C. Reeves, Asst. Atty. Gen., for the State.

FURMAN, PRESIDING JUDGE. On the 18th of November, 1907, an information was filed against Nick Arie (hereinafter called defendant), by the county attorney of Comanche county, Oklahoma, for unlawfully disposing of intoxicating liquors to Zene Spurrier, on the 17th day of November, in Comanche county, state of Oklahoma. The defendant was placed upon trial on this charge and was found guilty by the jury, on the 25th day of November, 1907. A motion for a new trial was filed and overruled. The defendant was sentenced to thirty days imprisonment and to pay a fine of fifty dollars. The defendant excepted and brought the case to the Supreme Court by appeal. Upon the creation of the Criminal Court of Appeals, the case was transferred to this court as required by statute. The Act of May 18, 1908, creating the Criminal Court of Appeals, contains this provision:

> "If in any cause appealed to the Criminal Court of Appeals, in which the construction of the Constitution of this state, or of the United States, or any act of Congress is brought in question, the said Criminal Court of Appeals shall certify to the Supreme Court of the state, the question involving the construction of the Constitution of this state, or of the United States, or any act of Congress, for the final determination of the question so certified. Thereupon all further proceedings in said cause in the Criminal Court of Appeals shall await the decision of the Supreme Court upon such question. Upon the final decision of such question by the Supreme Court, said Supreme Court shall certify its decision on such question to the Criminal Court of Appeals, and said decision of such question by the Supreme Court shall govern said Criminal Court of Appeals."

In accordance with this provision of the law, this court certified the constitutional questions, with reference to the effect of the adoption of prohibition, to the Supreme Court for decision. In reply to this we have received the following answer to the questions propounded:

Certified Questions from Criminal Court of Appeals.

On the 14th day of December, A. D. 1908, the Criminal Court of Appeals certified to this court two questions, as will hereinafter appear in the body of the opinion, in which the construction of the prohibition article of the Constitution of the state is brought into question.

Williams, J. 1. "Was the constitutional provision with reference to the prohibition of the manufacture, sale, giving away, or otherwise furnishing intoxicating liquors and designated in the record as the 'prohibibition amendment to the Constitution' properly submitted to the people for their ratification or rejection, as required by the provisions of the act of Congress known as the 'Enabling Act,' entitled 'An act to enable the people of Oklahoma and Indian Territory to form a Constitution and state government, and be admitted into the Union on an equal footing with original states,' etc., approved June 16, 1906, c. 3335, 34 Stat. 276."

Section 4 of the enabling act (c. 3335, 34 Stat. 271) provides that:

"In case a Constitution and state government shall be formed in compliance with the provisions of this act, the convention forming the same shall provide by ordinance for submitting said Constitution to the people of said proposed state for its ratification or rejection at an election to be held at a time fixed in said ordinance, at which election, the qualified voters of said proposed state shall vote directly for or against the proposed Constitution, and for or against any provisions separately submitted. The returns of said election shall be made to the Secretary of the territory of Oklahoma, who, with the Chief Justice thereof and the senior judge of the United States Court of Appeals for the Indian Territory, shall canvass the same, and if a majority of the legal votes cast on that question shall be for the Constitution, the Governor of Oklahoma Territory and the judge senior in service of the United States Court of Appeals for the Indian Territory shall certify the result to the President of the United States, together with the statement of the votes cast thereon, and upon separate articles or propositions and a copy of said Constitution, articles, propositions and ordinances. And if the Constitution and government of said proposed state are republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of said election and the statement of votes cast thereon and a copy of said Constitution, articles, propositions, and ordinances, to issue his proclamation announcing the result of said election, and thereupon, the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, on an equal footing with the original states. The original of said Constitution, articles, propositions and ordinances, and the election returns, and a copy of the statement of the votes cast at said election, shall be forwarded and turned over by the Secretary of the territory of Oklahoma to the state authorities of said state."

There is no contention that the convention had not the authority to submit the prohibition article as a separate proposition.

On the 16th day of November, A. D. 1907, the President of the United States issued his proclamation, which is, in part, as follows:

"Now therefore, I, Theodore Roosevelt, President of the United States of America, do in accordance with the provisions of said act of Congress of June 16, one thousand nine hundred and six, declare and announce that the result of said election. wherein the Constitution formed as aforesaid, was submitted to the people of the proposed state of Oklahoma for ratification or rejection, was that the said Constitution was ratified, together with the provision for state-wide prohibition, separately submitted at said election, and the state of Oklahoma is to be deemed admitted by Congress into the Union, under and by virtue of said act, on an equal footing with the original states."

Plaintiff in error has failed to point out in what particular the same was not properly submitted, but see the following authorities: *Miller v. Johnson,* 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524; *Luther v. Borden,* 7 How. 1, 12 L. Ed. 581; *Prohibitory Amendment Cases,* 24 Kan. 700; *Kadderly v. City of Portland*, 44 Or. 118, 74 Pac. 715, 75 Pac. 222. Where a proposition has been submitted separately, at the same time with the Constitution, for ratification or rejection, and declared carried and accepted and recognized as properly adopted by the political departments of both the federal and state governments, and the party assailing the part claimed to be invalid on the ground that it was not submitted as required by the enabing act fails to point out wherein the same was not properly submitted for ratification or rejection, the courts will not in that event, if at all, declare the instrument, or any part of it, invalid for not having been properly submitted or adopted.

2. "Was the liquor license, held by the employer of tne plaintiff in error as a bartender, revoked by the adoption of the Constitution of Oklahoma, or continued in force in the state of Oklahoma for the period for which it was issued, by virtue of the provisions of section 1 of the schedule of the Constitution?"

For the purpose of ascertaining the intention of the framers of a Constitution we look at the entire instrument. The prohibition article (Bunn's Ed. § 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162), pursuant to section 4, *supra,* of the enabling act was submitted separately at the same time the main body of the Constitution was submitted for approval or rejection; if approved to become a part of the main instrument, in the event of its approval. Said article provides that:

> "The manufacture, sale, barter, giving away or otherwise furnishing, except as herein provided, of intoxicating liquors within this state or any part thereof, is prohibited for a period of twenty-one years from the date of the admission of this state into the Union. * * * upon the admission of this state into the Union these provisions shall be immediately enforceable in the courts of the state."

Section 3, Par. 2, of the enabling act, requires that a prohibition provision, containing practically the foregoing excerpt, should be incorporated in the Constitution of the proposed state, to apply to that portion of said state then known as the "Indian Territory," the "Osage Indian Reservation," and such as existed as Indian reservations on the 1st day of January, A. D. 1906, and to continue in force for the period of 21 years from the date of the admission of the state into the Union, and thereafter until the people of said state should otherwise provide by amending the Constitution and proper state legislation. Said provision was accordingly incorporated in said instrument. Section 7, art. 1 (section 9, Bunn's Ed.) Snyder's Ed. p. 16; Gen. St. Ann. Okla. 1908, p. 77. With a view that such provision might extend to the entire state, if approved by a majority of the electors thereof voting thereon, it was submitted as a separate provision, if approved to become a part of the main instrument, if ratified. Prior to the 1st day of January, A. D. 1906, and even up to the 16th day of November, A. D. 1907, intoxicating liquors were not permitted to be sold in the Indian Territory, the Osage Indian Reservation, or any other Indian reservation within the territory now embraced in the state of Oklahoma. This requirement of section 3, par. 2, *supra,* was a precautionary act on the part of Congress to continue in force, until the people of the state should otherwise provide in accordance with law, the prohibition of the sale of intoxicating liquors in the territory embraced in said state where prior thereto same had been prohibited.

Where the same language is used in different provisions, or different places in a Constitution the presumption is that it was with the same meaning, unless the context or contemporaneous circumstances should clearly indicate otherwise. It was the purpose in the incorporation of the provisions of section 7, art. I, *supra,* that the same should go immediately into effect as to such portion of the state, and that no intoxicating liquors should, under any circumstances, except as therein provided, be sold. "The most universal and effectual way of discovering the true meaning of a law is by considering the reason and spirit of it, or the cause which moved the legislature to enact it." I Bl. Com. 61. Now why is not the same language as used in the prohibition article (Bunn's Ed. § 499; Snyder's Ed. p. 394; Gen. St. Ann. Okla. 1908, p. 162) to be construed to the same effect as the other provision, to wit, that such prohibition article should, immediately upon the admission of the state, be enforceable in the courts of said state? It is contended that the schedule to the Constitution (sections 449, 450, Bunn's Ed.; Snyder's Ed. p. 380; Gen. St. Ann. Okla. 1908, p. 153) provides that: "In order that no inconvenience may arise by reason of the change from the forms of government now existing in the Indian Territory and the territory of Oklahoma, it is hereby declared as follows: "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the forms of government, but shall continue as if no change in the forms of government had taken place. * * *"—and for this reason the liquor license remains in force after the admission of the state into the Union, until it expires of its own limitations. To determine the meaning of this provisioin of the schedule and the intention of the framers, it would not be amiss to consider what the office of a schedule is. It is a temporary provision for the preparatory machinery necessary to put the principles of the government under the Constitution in motion without disorder or collision, not to control the principles of the organic law or to limit the same where it may be in conflict therewith, but to carry the whole into effect without break or interval; to shift the machine gradually into another track, and, having done its office, it is stowed away in the lumber room of the government. *Commonwealth v. Clark* (Pa.) 7 Watts & S. 133. The entire instrument is to be examined in arriving at the meaning of any part thereof, and to be construed as a whole. Effect is to be given, if possible, to each section, clause, and word; and if any part be doubtful, it must be interpreted with every fair intendment to harmonize with the main purpose, and not to defeat it. *Mabury v. Madison,* 1 Cranch, 174, 2 L. Ed. 60; *Bryan v. Menefee,* 21 Okla. 1, 95 Pac. 471; *Trapp v. Wells Fargo Express Co.,* 22 Okla.—97 Pac. 1003.

If the public safety or public morals require the discontinuance of traffic in the sale of intoxicating liquors, the hand of the Legislature cannot be stayed in providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All such rights are held subject to the police power of the state. *Beer Co. v. Mass.,* 97 U. S. 32, 24 L. Ed. 989. The weight of authority is overwhelming that no immunity, by virtue of any constitutional provision, either federal or state, exists so as to prevent the state Legislature from regulating, and even prohibiting the traffic in intoxicating drinks. *Bartemeyer v. State of Iowa,* 85 U. S. 129, 21 L. Ed. 929; *Mugler v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. A liquor license granted under the exercise of the Police power of the state is subject at all times to be annulled or revoked at the pleasure of the Legislature. *Powell v. State,* 69 Ala. 10; *Fell v. State,* 42 Md. 71, 20 Am. Rep. 83; *Kresser v. Lyman* (C, C.) 74 Fed. 765; *Board v. Barrie,* 34 N. Y. 659; *People v. Murray,* 149 N. Y. 367, 44 N. E. 147, 32 L. R. A. 344. A license to carry on the liquor traffic is revoked or annulled by the repeal of the law authorizing the granting of such license, or by any change in the legislation of the state or district inconsistent with the further exercise of the right conferred by the license, such as the adoption of a prohibitory amendment to the Constitution, statute, or local option law. *Prohibitory Amendment Cases,* 24 Kan. 700; *State v. Tonks,* 15 R. I. 385, 5 Atl. 636; *Pleuler v. State,* 11 Neb. 547, 10 N. W. 481; *Hirn v. State,* 1 Ohio St. 15; *Hogan v. Guigon* (Va.) 29 Grat. 705; *Kresser v. Lyman* (C. C.) 74 Fed. 765; *Brown v. State,* 82 Ga. 224, 7 S. E. 915; *State v. Mulenhoff,* 74 Iowa, 271, 37 N. W. 329; *State v. Holmes,* 38 N. H. 235; *State v. Cooke,* 24 Minn. 247, 31 Am. Rep. 344; *Ex parte Lynn,* 19 Tex. App. 293; *Robertson v. State,* 12 Tex. App. 541; *Moore v. State,* 16 Miss., 137; *Sprayberry v. Atlanta,* 87 Ga. 120, 13 S. E. 197.

In the case of *Criswell v. Montana Central Ry. Co.,* 18 Mont. 172, 44 Pac. 525, 33 L. R. A. 554, the court held that by a Schedule rights were preserved, and it operated of itself to keep in force a system of laws for the government of the state, unless such laws were inconsistent with the Constitution. But that, as to such repugnant statutes, it operated as an effective repeal, for when the Constitution became the fundamental law, acts in conflict with it yielded; and when the question of a conflict is presented to the court, and the conflict clearly appears, the statute must be decided to be inoperative and void. In the case of *Watsi v. Montana Central Ry. Co.,* 24 Mont. 170, 61 Pac. 9, the court in construing section 1 of the Schedule to the Constitution, which is substantially the same as ours, said:

> "The Constitution operated upon the statute so as to prevent other rights from accruing thereunder, but under its saving clause, as expressed in the section of the Schedule quoted, the right already accrued was preserved to be enforced 'under the laws of the state,' whatever they might be; for, after the right became fixed its enforcement no longer depended upon the statute, but was to be governed by the general provisions of the Code, suitable to the enforcement of all rights, without regard to their origin. This being our conclusion, it is not necessary to discuss what would have been the effect upon plaintiff's right in the absence of this section of the Schedule. An inquiry upon this subject would necessarily lead to an examination of the question whether the right asserted by the

plaintiff under the statute is 'property' within the meaning c the fourteenth amendment of the Constitution of the Unite States, and whether the section of our Constitution (section : art. 15), which repealed the statute, is within the malediction c the first section of that amendment."

Sections 1 and 9 of the Montana Schedule are substantiall the same as sections 1 and 2 of that of Oklahoma.

It is earnestly insisted by counsel for the plaintiff in errc that the privilege of engaging in the liquor traffic by virtue c a license is a right; but, under the authorities heretofore referre to, it is only such right or privilege as is subject to be discor tinued at the will of the Legislative power. The laws permittin the license of the liquor traffic (article 1, c. 49, Wilson's Rev. Ann. St. 1903), at the time of the admission of the state into tl Union, were repugnant to the provisions of said prohibition ai ticle of the Constitution, and consequently did not extend to an remain in force in the state of Oklahoma after the admission c the state. Section 2, Schedule to Const. Okla.; section 45 Bunn's Ed.; Snyder's Ed. p. 381; Gen. St. Ann. Okla. 1908, 153. The law under which the license existed having failed, tl right to continue business thereunder ceased. The validity of tl license ceased with the repeal of the law by virtue of which came into legal existence; the proclamation admitting the sta of Oklahoma into the Union striking down the liquor licen law, which prior to that time existed in Oklahoma Territory.

In the case of *Alsman et al. v. State of Oklahoma,* decide by this court on May 13, 1908, 21 Okla. 142 (95 Pac. 468, 16 R. A. [N. S.] 511), it was held that in any action to recover certain sum the unearned portion of license fee, paid by license to licensor while a city of the first class, organized and existir under the laws of the territory of Oklahoma, for a license du issued to sell malt, spirituous and vinous liquors, the petitic which states that by reason of the ratification and adoption the Constitution of the State, together with the prohibitory clau as a part thereof, by vote of the qualified electors of said pr posed state on September 17, 1907, prohibiting the sale of suc liquors within the said territory upon its admission into the Union, and that said city since that time, without fault of the licensees, forced said licensees to close their place of business and cease to sell such liquors under their said license, under threats of prosecution, sufficiently states a cause of action, and a demurrer thereto was improperly sustained. The question raised here was not discussed in that case, but it was necessary to assume that such license was revoked by the adoption of the Constitution before Oklahoma City would have had a right thereby to prevent, by prosecution, such parties from carrying on their business, under such license, on the ground of the adoption of said prohibition article. We conclude that the rights referred to in section 1 of the Schedule to the Constitution do not include such rights as the exercise of which depends upon a law, the repeal of which abrogates the continuance of such right, when the continuance of the same is repugnant to the spirit, as well as the letter, of the Constitution. *Cusic v. Douglas,* 3 Kan. 123, 87 Am. Dec. 458.

We accordingly conclude that a liquor license, the time for which it was issued not having expired at the time the state of Oklahoma was admitted into the Union, was revoked and discontinued when said Constitution became effective.

All the Justices concur.

In addition to the questions certified to the Supreme Court the defendant in his brief seeks to secure a reversal of this case upon the following ground:

"The information in this case fails to show upon its face that the prosecution was by the authority of the state of Oklahoma, as required by section 19, art. 7., of the Constitution."

The clause of the Constitution relied upon by counsel is as follows:

"Sec. 192. The style of all writs and processes shall be 'The State of Oklahoma.' All prosecutions shall be carried on in the name and by the authority of the state of Oklahoma. All indictments, informations, and complaints shall conclude, 'Against the peace and dignity of the state.' " (Bunn's Const. of Okla.)

In the case at bar, while it is true that the information, upon its face, does not state that it was presented in the name and by the authority of the state of Oklahoma, yet the entire record shows that this prosecution was carried on in the name and by the authority of the state. We could cite pages of authorities to show that this is all that the Constitution requires, but will content ourselves with quoting section 2, p. 422, Vol. 10 of Cyc:

"Under the constitutional requirements that criminal prosecutions shall be carried on in the name and by the authority of the state, precedents seem to indicate that this is made to appear in the commencement of the indictment when it is expressly shown; but the authorities in which the question has been presented seem to be agreed that there need be no formal statement of the fact in the indictment when it appears from the record that the prosecution is actually conducted by the authority of the state, as the only object of the Constitution requiring prosecutions to be in the name of the state is to exclude any other or foreign power from the exercise of such authority."

In cases less than capital this court will not consider any questions except those presented in the briefs of counsel; all others are waived. This is the settled policy of this court. Therefore we will not consider other questions arising during the trial, which are not presented in the briefs.

The judgment of the lower court is affirmed.

BAKER and DOYLE, JUDGES, concur.

A. N. BYERS v. TERRITORY.

No. 2177, Okla. T. Opinion Filed March 15, 1909.

(100 Pac. 261.)

1. **EVIDENCE—Matters of Common Knowledge—Harmless Error—Admission of Expert Testimony.** Expert testimony is not admissible upon questions which the court or jury can decide upon the facts. When the relation of facts and their practicable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions and inferences must be drawn by the jury; but, to render the admission of such expert testimony reversible error, it must tend to solve or to determine some issue in the case adversely to the accused, and if it be clear that its admission did not do so, or in some manner injuriously affected the accused, this court will not reverse the judgemnt of the court below because of its admission.

2. **APPEAL—Harmless Error.** This court will not reverse the judgment of the trial court, where the record before it shows that the accused had a fair trial, by a fair and impartial jury and trial judge, simply because harmless error may have occurred at the trial.

3. **NEW TRIAL—Newly Discovered Evidence.** It is not an abuse of discretion for a trial court to overrule a motion for new trial based on the grounds of newly discovered evidence, if such evidence is unimportant, immaterial, or cumulative, and the submission of such evidence to the jury would not have produced, or tended to produce, a different verdict from that rendered in the case.

4. **INSTRUCTIONS—Requested Instructions Covered by Others.** It is not error for the court to refuse to instruct the jury at the request of the accused, if such requested instructions, though proper, are fairly covered by the general instructions given the jury by the trial court.

(Syllabus by the Court.)

Error from District Court, Comanche County; F. E. Gillette, Judge.

A. N. Byers was convicted of manslaughter, and he brought error to the Supreme Court, whence the cause is transferred to the Criminal Court of Appeals. Affirmed.

At the August, 1906, term of the district court the grand jury of Kiowa county returned an indictment against the plaintiff in error (hereinafter referred to as the accused), charging that on the 27th day of December, 1904, he committed the crime of murder by taking the life of his wife, Salinda Byers. At the same term of court a change of venue was granted on application of the accused, and the case was transferred to Comanche county, the accused was tried and found guilty of manslaughter in the first degree. A motion for a new trial was filed and overruled, and on the 12th day of October, 1906, judgment was pronounced, sentencing the accused to the penitentiary for a term of 15 years. On March 25, 1907, an amended motion for a new trial, on the grounds of newly discovered evidence, was filed, said motion being supported by several affidavits. The amended motion for a new trial was overruled on the 5th day of April, 1907. An appeal was prosecuted from said judgment to the Supreme Court of this state, where the same was pending at the creation of this court. Upon the creation of this court said case was duly transferred.

A. J. Morris and *Stilwell H. Russell,* for plaintiff inerror.— On inadmissibility of expert opinions in matters of common knowledge and question of harmless error: *People v. Smith* (Cal.) 29 Pac. 64;*Railway Co. v. Kellog,* 94 U. S. 469; *Fire Insurance Co. v. Gruver,* 100 Pa. St. 266; *Mining Co. v. Broderick,* 25 Colo. 16; *Cooper v. State,* 23 Tex.; *Stumore v. Shaw* (Md.) 6 Am. St. Rep. 412; *Railroad Co. v. Jones,* 114 Ala. 519; *Jones v. State,* 71 Ind. 84; *Wilson v. United States,* 5 Ind. Ter. *Smith v. Shoemaker,* 17 Wall. 630; *Railroad Co. v. O'Reilley,* 158 U. S. 334; *Railroad Co. v. Wilson,* 12 Colo. 20.

Charles West, Atty. Gen., and *Charles L. Moore,* Asst. Atty. Gen., for the State.— On question of harmless error: Wilson's Rev. & Ann. St. 1903, §§ 5144, 5618; *Wells v. Territory,* 14 Okla. 441; *Morris v. State,* and *Cannon v. State, ante,* this volume.

BAKER, JUDGE (after stating the facts as above). The accused relies upon the following assignments of error:

"(1) The court erred in admitting certain evidence on behalf of the defendant in error; (2) the court erred in excluding evidence offered by the plaintiff in error; (3) the court erred in its instruction to the jury; (4) the court erred in overruling a motion for a new trial on behalf of the plaintiff in error; (5) the court erred in rendering judgment against the plaintiff in error; (6) the court erred in overruling plaintiff in error's motion for a new trial on the grounds of newly discovered evidence; (7) the court erred in refusing certain instructions requested by the plaintiff in error; (8) error of the court occurring at the trial and excepted to by the defendant."

The first error claimed is directed to the admission of the testimony of Dr. Miller over the objection of the accused. The doctor was asked the following question:

"I will ask you if a woman of the build and stature of Mrs. Byers, dressed in the manner and condition in which you found her at the time of her death, could have taken the pistol, a double action, say, with a barrel four inches in length, and have inflicted, holding it in her right hand, the wound on her person such as you found under the arm and on the left side of the body."

The doctor's answer was that it would have been impossible for the deceased to have inflicted the wound from which she died. A similar question was asked Dr. Voyles, and he was permitted, over the objections of the accused, to answer, and answered: "It is inconveniently possible, but not probable." It is urged by counsel for the accused that prejudicial error occurred in the admission of testimony of said doctors, on the ground that the evidence does not relate to any trade, science, or profession, but relates solely to a physical fact, of which the jury, as a matter of common knowledge, were as competent to judge as the witnesses. This court recognizes the rule that expert evidence is incompetent if the facts proposed to be proved are within the common experience of mankind. This court believes that it is much safer to confine the testimony of witnesses to the facts, in all cases where it is practicable, and leave the jury to exercise their judgment and experience upon the facts proved; that it is generally safer to take the judgments of unskilled jurors than the opinion of hired, and generally biased, experts. Still we are not ready to discard expert testimony, as in many cases it is both essential and important.

The question therefore arises: Was the testimony complained of, in the light of all the evidence in the case, prejudicial to the material rights of the accused, and was the testimony of such character as to prejudice the rights of the accused? In other words, did the admission of this testimony deprive the accused of a fair and impartial trial? The question can only be properly determined by a careful reading and investigation of all the evidence contained in the record. This we have done, and we find from the record that the evidence, though possibly improper as expert testimony, was not, in the light of all the testimony, harmful to the rights of the accused; the theory of the defense being that the accused was not guilty of the homicide, but that death resulted from wounds inflicted by the deceased, or in some way, in the struggle that ensued to prevent great bodily harm or possibly death to the accused. There is no controversy whatever about the cause of the death. No witness contradicted the statements made by the accused in explanation of the occurrence which resulted in the death of his wife. There is dispute about the location of the wounds, or the point of entrance, course, and exit of the bullets that produced the wounds found upon the body of the deceased. The accused was given the greatest latitude by the trial court in describing the scenes and occurrences at the time of the homicide. Other witnesses were permitted without objection, to locate and describe the wounds upon the deceased, their entrance, course and exit through the head and body, and all the surrounding facts and circumstances in detail.

We find the case of *Wells v. Territory of Oklahoma,* 14 Okla. 436, 78 Pac. 124, on the question of harmless error in the introduction of expert testimony an instructive one, and seems to us to be the law. The second syllabus reads:

> "Where a witness, who is qualified as a medical expert, as coroner had made a careful examination of the body of the deceased and the surroundings shortly after the homicide, and, after having described the wounds, points of entrance, and exit and direction of the bullet through the body, and all of the surrounding facts and circumstances in detail, was permitted to give his opinion as to the position of the deceased at the time that the wound was inflicted, and where the defendant admits the killing, and there is no issue on which the testimony could operate against him, held, if error, harmless, and would afford no grounds for reversal."

Another very carefully considered case is the case of *Coyle v. State,* 31 Tex. Cr. R. 604, 21 S. W. 765, the fourth syllabus reading as follows:

> "On a trial for murder, where the physician testified that from his examination of the wound and clothing of deceased immediately after the homicide, etc., it was his opinion that at the time the shot was fired the right arm of deceased was hanging at his side, slightly to the rear of a perpendicular line, held that,

conceding the position of deceased's arm could not thus be proved still to render the admission of such testimony reversible error it must tend to solve some issue in the case adversely to the defendant; and, if it be clear that its admission did not do so, nor in some way injuriously affect him, this court would not be authorized to reverse the judgment because of its admission."

These cases we believe correctly state the law. We, therefore, approve them. See, also, cases cited in 12 Amer. & Eng. Enc. of Law (2d Ed.) p. 449.

We think that in the light of all the testimony in this case, the testimony of both Dr. Miller and Dr. Voyles was not in the least harmful or prejudicial to the accused, and the court did not therefore commit reversible error in permitting the introduction of the same.

The accused also complains of the court below in refusing to allow him to answer a question propounded to him by one of the jurors, in which the juror asked: "Would it not be pretty near impossible for her to get her left arm in under both of your arms after that?" We think the trial court properly interferred when he said: "That is a physical fact that is to be determined by the jury from the evidence, and not by the witness." The question of the juror does not seem predicated upon any proof offered, there being no testimony that the left arm of deceased was under both arms of the accused, and it seems to this court that the court below did an act of kindness toward the accused in not permitting this question to be answered; for in the light of the testimony we are unable to see how any answer could be given to this question that would be beneficial to the accused. He had every opportunity to explain how her left arm might have gotten under both of his arms if that was a material circumstances in the case beneficial to accused. He had full opportunity to explain all that occurred at the time of the homicide.

We fail to see error in the exceptions taken to the testimony of witness Delestineer. And are likewise unable to see how the accused was prejudiced by excluding from the jury the evidence of John Newby when he was asked, "Do you remember starting to haul some things from the house there once, and Mrs. Byers got the sewing machine and threw it under the wagon, and threw other stuff out, and broke up things generally?" his answer being, Yes, sir." And the further question was asked Newby: "And Mr. Byers had to ask you to go away and leave things?" which he also answered, "Yes, sir." We cannot understand how this sewing machine incident could have had any direct bearing upon the homicide, or throw any light upon it, and therefore its exclusion was not prejudicial to the accused.

The remaining error growing out of the exclusion of testimony relates to certain transactions between the accused and one Grofner, a former husband of the deceased. This court is unable to understand how the accused could have been prejudiced in the exclusion of the testimony of the accused concerning his difficulty with Grofner. Many threats had been shown to have been made by the deceased against the accused, many of them being threats to kill the accused. The threats involved in the controversy between the accused and Grofner, having occurred in April, 1903, were therefore somewhat too remote to have shed any light upon the question as to who was the aggressor in the controversy that resulted in the death of the deceased in this case; nor did it shed any light upon the question as to whether the accused acted in self-defense or not, and did not reflect the state of the accused's mind at the time of the homicide. We do not think the court erred to the prejudice of the accused in excluding the evidence regarding the Grofner transaction from the jury. Naturally the testimony of the witnesses at the trial varied somewhat in minor details. So far as the record shows, no one save the participants were present at the time, or witnessed the homicide, and the immediate circumstances leading up to it.

The evidence clearly shows that about 6 o'clock on the evening of the 27th of December, 1904, certain shots were heard in the direction of the home of the accused and deceased, in the town of Gotebo. Some 20 minutes after the shots were fired accused appeared in Dalton's store in said village, complaining of a scalp wound, a weak heart, and injuries to his hip, apparently suffering great pain, and was greatly excited. He gave various accounts of his trouble with the deceased, and, calling attention to the scalp wound on his head, exclaimed, "She shot, she shot, and just kept on shooting." At the trial the accused claimed the wounds were inflicted on the deceased by the accidental discharge of a pistol held in her right hand, which he had pushed around to her left side, but, owing to his intense excitement at the time, he could not explain just how it all happened. About an hour after the tragedy, when the officers returned to town after finding the body of the deceased, the accused was placed under arrest, and when told that he was arrested for shooting his wife, said: "Why, bless your soul, I didn't know she was shot." At the trial he claimed he acted in self-defense; that while sitting down, or about to sit down to a typewriter to write a letter to his sister, his wife, without warning, shot him with a pistol, the bullet grazing his head and inflicting a scalp wound, being the wound he complained of shortly after the tragedy; that in the haste and excitement in raising to his feet after he was shot he overturned the typewriter table with the machine upon it, then turning around, facing his wife, seized her by the right wrist, she at the time holding the weapon in the right hand, and that then a life and death struggle ensued to prevent her from killing him, and which ended by both falling on the bed, he in a dead faint; that when he recovered his consciousness he found his wife's body prostrate and bleeding, and then endeavored to mop up some of the blood with the bed clothing, and caught her by the ankle and called her by name, but she made no response.

According to the testimony of the witness Martin, on Saturday night prior to the tragedy the accused told Martin he thought he would have to kill his wife. He was the owner of the pistol with which the fatal shots were fired. There was no evidence of the pistol being in the possession of the deceased prior to the homicide. The pistol was a 38 caliber, and was about 6 1-2 or

7 inches long. One shot entered just below and behind the left ear of the deceased, the bullet ranging slightly upward from the point of entrance, emerging from the right cheek, the bullet being found about a year afterwards in a mass of coagulated blood in the bed clothing which was under her at the time she was found dead. From the testimony of Heck Thomas, who testified, without objection, as a pistol and gunshot wound expert, the jury could well find that at the time of the discharge of the pistol the muzzle must have been some little distance from the point where the bullet entered the neck, the pistol not being close enough, at the time of its discharge, to deposit flakes of burned powder around the bullet hole. It is undisputed that this wound was instantly fatal. The location of the wound was such as to have ruptured at least one of the large arteries of the neck. The bullet of the other shot entered into the body of the deceased immediately behind and below the left arm, and emerged at the left nipple. This bullet was found resting by its own weight near the right nipple in the under vest of the deceased. No trace of blood was found in any part of the room, except upon the bed and clothing of the deceased, and a curtain hanging near the bed. About 20 minutes elapsed after the shots were fired before the accused left the house where the homicide occurred. There is no dispute that the deceased's body was found lying clear across the foot of the bed upon her face and stomach, and her head near the wall at the back side of the bed, her feet protruding over the front; one of her leggings was smeared with blood, the left hand under the body, and the right partially extended. The pistol was found in her right hand, with the middle finger of her right hand on the outside of the pistol guard. There were three empty chambers in the pistol.

Search was made for the bullet holes in the walls of the room where the tragedy occurred at the time the coroner's inquest was held, which occurred soon after the finding of the body. Search was also made the next morning, but no bullet holes were found. The search was especially directed to the place over the typewriter table. Some two weeks later, however, the witnesses for the defense found what they claimed to be a bullet hole in the wall about four feet from the floor, at a point near where the typewriter table stood at the time of the homicide. The evidence also shows that the typewriter table was tilted on its side, and the machine lying on the floor bottom side up, apparently uninjured. The dining table was overturned, but the dishes were unbroken, though strewn in confusion on the floor. A bowl of milk on the floor was found unspilled. The deceased's hair combs and false teeth were found on the bed with the body. The scalp wound on the accused's head, as testified by the doctor, was a mere scratch, an abrasion so light as not to penetrate the cuticle. It was not conceded by the state that the wound on the top of the head of accused was a gunshot wound; but, on the contrary, the state claimed that it was inflicted by the accused in furtherance of his defense of justifiable homicide. The physician who dressed the wound said it was free from powder burns. There was no evidence whatever to show that the wound on the scalp of the accused and the hole in his hat had any relation to each other. It seems that the hat said to have been worn by the accused at the time he was shot was stolen from the possession of the attorney for the accused.

The accused at the time of the tragedy was about 62 years old, and the deceased about 41 years old. His weight was about 220 pounds, and hers about 202 pounds. The accused in his own behalf testified to many quarrels occuring between himself and deceased at intervals during all their married life. He testified that she had driven him from his home; had often threatened to kill him; had sued him for a divorce; caused his arrest, and placed him under a peace bond; and that she was persistently demanding that he make over to her title to certain lots and lands he owned in Gotebo. He also testified that she did everything to defeat him in a certain contest involving the town site of Gotebo, and also to having a personal difficulty in her presence with her former husband; of her villification of him and his married son, who had married a daughter of the deceased; that a young son of the deceased by a former marriage had treated him insolently; of his doting love for her, and cowardly fears of her. We have carefully considered instruction No. 22, complained of by the accused, and we think the court below committed no error in giving said instruction, in the light of all the evidence. The court gave the accused great latitude in detailing the many difficulties between himself and deceased, and giving the many threats made by her; and we think the accused was fairly dealt with in this connection.

The jury in this case, so far as the record shows was fair and unbiased. They heard the evidence as it fell from the lips of the witnesses; they had the opportunity of facing the witnesses on both sides; they had the means of judging of their intelligence, their candor, or want of candor, their interest, if any, in the event of the case. The jury may have concluded from the testimony that certain deductions therefrom would irresistibly follow, and that these deductions were inconsistent with the accused's innocence. We think the jury was justified in believing that the evidence offered by the defense in justification of the homicide was invented by the accused to conceal the actual truth of his conduct, and thereby to put the acts of the deceased in a false and unfavorable light before those who should have to pass upon the question of his guilt or innocence. The jury probably concluded that the wounds of the deceased were "dumb mouths" "silently proclaiming" the physical impossibility clearly apparent from such wounds, and that said wounds could not have been inflicted, or resulted from shots fired from a pistol then held in the hand of the deceased, and that, the defense of justifiable homicide set up by the accused was thereby overcome and disproven, and the jury, as a matter of law, had a right to disregard it.

The jury may also have believed from the evidence of the peculiar position in which the pistol was found in the unclinched hand of the deceased that the pistol was placed there after death, and after the muscular convulsions of her body had ceased; they may have concluded from the evidence that the reasonable hypothesis consistent with the facts proven was that the deceased had fallen asleep across the foot of the bed, while lying on her right side, with her head near the wall; that the accused standing at the foot of the bed, in a position near and partially over her, fired the shot which entered near the left ear; and that to complete the work of destruction the second shot, within a few seconds thereafter, was fired into her body, and caused death to be doubly sure. The jury may have justly concluded from the evidence that the accused had, before the killing, in his own mind outlined a plan of defense satisfactory to himself; but that in so doing he probably did not reckon rightly with the immutable and eternal laws of nature, nor could he prevent the inquisitive minds of men from investigating and pursuing to a logical conclusion the reasonable and natural deductions which follow from the well-known laws of cause and effect. The jury may also have concluded from the evidence that the 20 minutes immediately following the firing of the fatal shots were spent by the accused in putting the house in order for the ordeal near at hand, when every eye in the community would be turned in scrutiny upon it.

It is difficult to see how the jury in this case could have prevented being influenced to a considerable extent by proof showing that the bullet, which had passed through the neck and mouth of the deceased, was found concealed in a clot of blood in the bed clothing upon which the body of deceased was found. They undoubtedly were influenced by this evidence to believe, as they had a perfect right, that the shot that sent the bullet through the neck and mouth of the deceased was fired while the body was lying on the bed. If not, the weight of the bullet itself would have caused it to fall downward onto the floor of the room, and if the force was sufficient, would have penetrated the wall of the room. The other bullet, found inside of the undervest of the deceased, shows conclusively that after the ball issued from the wound at the left nipple it declined by its own weight until arrested by the garments of the deceased at the right nipple. It will be remembered that the body of the deceased when found was lying on its left side or stomach. Had the deceased been on her feet at the time this bullet was fired, it would have naturally gravitated downward.

The jury were undoubtedly also influenced against the innocence of the accused by the undisputed proof of the apparent disorder of the room in which the body was found. The dining table was upset, and a dozen or more dishes were on the same, the dishes were thrown to the floor, but none were broken. The typewriter was also thrown from the table onto the floor, and was found upside down, but no proof that it was in any way broken or injured. The bowl of milk which the accused says he sat on the floor nearby the bed, and close to the scene of the death struggle, also was undisturbed and the contents intact.

The jury may also have reasonably concluded from the evidence that the three empty chambers in the revolver found by the deceased were accounted for by the two shots which pierced the body of the deceased, and that the other shot was used on the hat of the accused. It is true there is some discrepancy in the evidence as to whether the hat of the accused had two holes in it or but one. The defense offered no evidence to help clear this discrepancy, although it is proved and undisputed that the hat of the accused was taken possession of by one of his able attorneys, Mr. Morris. It seems to us, and it undoubtedly so appeared to the jury, that proof as to the number of holes in the hat of the accused could have easily been supplied, if in fact more than one hole was in the hat, shortly after the homicide. The record being practically silent on this point, the jury were free to believe from the absence of such proof that the hat either had but one hole immediately after the homicide, or if it had two holes, such holes could have no relation to the shot which the accused claims was fired by the deceased and took effect on his head. It will be conceded that the second hole in said hat, properly located, would have been a strong circumstance favoring the contention of the accused that he was in fact shot by the deceased, as by him claimed; and, by like process of reasoning, the absence of such fact would naturally weigh against the best interests of the accused. Under the circumstances, therefore, the jury in all probability concluded that the wound upon the head of the accused was not made by a bullet, but was self-inflicted, or was caused by some other means. Especially is this true when the testimony of the doctor who dressed it, in describing the wound on the head, does not necessarily describe it as a gunshot wound.

The jury probably also took into consideration in this connection the evidence of the accused that the deceased was experienced and handy in the use of firearms, he having testified to the fact that he and deceased frequently went hunting together, and that she was a good shot, and the further fact that the evidence shows that the pistol which caused the death of deceased was a self-acting (double action) one; that if the pistol had been, in fact, in the hand of the deceased, and by her discharged at the head of the accused, and the accused in the act of sitting down to a table to use the typewriter, as testified to by him, before the accused could have gotton hold of the wrist of the deceased, who was admitted to have been a powerful woman, said pistol would have again been discharged, and especially is this true if the deceased had deliberately planned to kill the accused.

The jury being reasonable men, were bound to take into consideration the disorderly condition of the clothing of the deceased as described by the witnesses who found her dead, and about which there is no dispute. They may have wisely, and correctly, concluded from the proof that the accused thought it necessary or expedient, when the time arrived for placing in her hand the deadly weapon which was found, to roll the deceased onto her left side or stomach; because if the theory of the state is true, the deceased was lying on her right side on the bed when the shots were fired which killed her. The importance of placing her on her left side or stomach, therefore, becomes very apparent. This would be a necessary position if it was desired that the right arm might be extricated or extended. The jury may also have justly concluded, that in the efforts of the accused to place the body in the position in which it was found, he besmeared his hands with the blood of his victim, a part of which was found on her leggings in the form of bloody finger marks. It may have been a hard thing for the jury to believe in this case (if the theory and evidence of the accused is true) that, after the deceased received the fatal wounds, in her death plunge, and after making the struggle testified to by the accused in her efforts to kill him, she should be able to deposit her body full length on the bed, and on the exact spot where she would naturally lie down for a rest or a nap, and that in so doing she had taken two combs out of her hair, her false teeth out of her mouth, and carefully laid them on the bed.

This court believes that trial by jury is the most satisfactory method for determining disputed questions of fact in a criminal case. Time has taught the world, and especially the English-speaking portion thereof, that the jury system is one of the institutions which is deeply rooted into the hearts of all fair-minded people. The wisest jurists and ablest statesmen have bestowed unstinted encomiums upon it. It stands as a great bulwark against oppression and imposition; and, in the opinion of this court, is the highest form of human justice. Believing as we do, we can conceive of no higher conception of the proper discharge of official duty than the giving to a verdict, rendered by a fair and impartial jury, in a fairly tried case, full credence and respect, and conclude that the facts have been properly determined. The facts having been so determined, there is but one true guide for this court, and that is to apply the law as it is written and make the enforcement thereof an imperative duty. This court accepts the verdict in the case at bar as a fair, honest, impartial, and humane finding upon the facts in the case. And again announces that this court will not reverse a case when the record before it shows that the accused had a fair trial, by a fair and impartial jury and trial judge, simply because some harmless technical error may have occurred at the trial.

We come now to deal with the instructions given the jury, and which are assigned as reversible error. The record discloses that at the conclusion of the court's instructions the accused excepted to each and all of the instructions separately. It is not contended by the briefs of the accused that all of the instructions were erroneous. Instruction No. 12, found at page 526 of the record, reads as follows:

"You are further instructed that under the laws of the territory of Oklahoma homicide is justifiable when committed in the lawful defense of a person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there is imminent danger of such design being accomplished."

The accused urges that the jury was, in effect, told that, in order that the homicide be justifiable, there must not only be reasonable grounds to apprehend a design to commit a felony, or to do some personal injury, but there must be actual and imminent danger of such design being accomplished. Again we are forced to an examination of the evidence to determine the correctness, or otherwise, of the charge No. 12 complained of. We find from the record that the testimony shows that the danger, if in fact danger there was to the accused, was actual danger, and was apparent to him; and, if this testimony is true on this subject, he could have taken but one view of the situation, and that was that he was in actual and imminent danger of great bodily harm or death, and therefore we think charge No. 12, though not a model of perfection, is not against the accused.

Charge No. 13, complained of, as shown by the record, is as follows:

"If you find from the evidence, beyond a reasonable doubt, that the defendant, A. N. Byers, at the time and place charged in the indictment, shot and killed the deceased in the manner charged in the indictment, you should then determine the question as to whether or not such act was without authority of law, and you are instructed that such act was not without authority of law if you find the same to have been justifiable, according to the definition of justifiable homicide herein given, and you are further instructed that if the act charged against the defendant is shown to have been by him committed under such circumstances as that the act is excusable under the definition of excusable homicide as given in these instructions, he is not guilty as charged in the indictment herein, and you should so find."

Only a portion of the above charge is set up in the brief of the accused. This court believes in, and approves, the wisdom and binding force of section 5618, Wilson's Rev. & Ann. St. 1903, which reads as follows:

"On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial right of the parties."

This court has a number of times, in other decisions, recognized the force of the above rule. Section 5144 of our statutes reverses the common law, which provides that the penal statutes are to be strictly construed, and expressly provides that all proceedings are to be liberally construed in the furtherance of justice, and therefore the common-law rule as to strict construction of penal laws has been repealed by the Legislature, and is not in force in this state; but, on the contrary, it is made the duty, by the statute, for this court to construe all laws liberally and in the furtherance of justice, and this court is thereby forbidden to reverse a conviction upon technical errors, or exceptions which do not affect the substantial rights of the accused. We, therefore, feel it our duty to examine the entire record before passing upon technical defects or exceptions in the charge of the court which do not go to the extent of affecting the substantial rights of the accused. We have carefully read every word of the record, and given every proposition therein contained careful attention and close scrutiny. It is further urged by the distinguished counsel for the accused that the court in said charge No. 13, in substance, told the jury that if they should find the acts of the accused to be justifiable under the definition given in the instructions in this case, he would not be guilty as charged in the indictment, and that by instruction No. 12 the jury was told, in effect, that in order that the homicide be justifiable, there must not only be reasonable grounds to apprehend the design to commit a felony, or to do some great personal injury, but there must be actual and imminent danger of such design being accomplished, contending that these instructions eliminate from the jury the thought that the accused had a right to view the situation as an ordinarily prudent man, and act upon apparent, rather than real, danger to which he was subjected. From an examination of the entire record, and the authorities applicable thereto, we find instruction No. 12 is a fair definition of justifiable homicide under the laws of the territory of Oklahoma, and seems to be in the language of a second subdivision of section 2189, Wilson's Rev. & Ann. St. 1903, which statute was in force at the time the offense charged was committed.

We find further on this subject that the justly popular and highly respected Court of Criminal Appeals of the state of Texas has passed directly upon this proposition in a well-considered and ably rendered opinion written by that great jurist, Judge Hurt, in the case of *Allen v. State,* found in 24 Tex. App., commencing at page 216, 6 S. W. 187. In this case Allen was charged with the killing of Tom Gill with a pistol. The testimony established the fact that there had been a passage of words between Allen and Gill, with a show of violence on the part of Gill just before the shooting occurred, and that Gill had a pistol in his hand. The real danger in the *Texas case* was the pistol in the possession of Gill. There was some discrepancy in the testimony as to who fired the first shot, as the shots were so close together. It is contended that the court erred in instructing the jury that it would be immaterial whether the danger was real, provided the defendant acted on the real appearance of danger. The specific objection raised to the charge of the court in this case is practically the same as that urged by the accused in the case at bar, and is this: "That it limits and abridges the right of the accused to act upon the real appearance of danger, and omits reasonable appearance of danger." The court in said case, speaking of danger with reference to whether the appearance of it is "real" or "reasonable," takes its classification under one or the other, according as to whether the manifestations are positive or threatening and imminent, or are merely such as reasonably create alarm and apprehension for one's safety.

The danger in the case at bar was real, and consisted of the pistol in the hand of the deceased, as shown by the testimony of accused. "Real danger is danger such as is manifest to the physical senses. "Reasonable" danger, as the very force of the term imports, is something to be judged of by an exercise of reason and judgment, an exercise upon facts which require a construction to render their meaning apparent. It is manifestly true from the facts in the case at bar that whatever danger there was to accused, if any at all, was real. Hence the court discharged its whole duty when it instructed the jury as it did in instructions numbered 12 and 13. The court was not bound to instruct upon any other form of danger, because the facts did not present any other cause of danger. Every instruction given by the court to the jury in the trial of a cause should be confined to the issues made by the facts.

We have carefully read all the cases cited by counsel for the accused, filed in their separate and exhaustive briefs, and we cannot agree with the distinguished counsel that the facts in this case are indentical, or even similar, to the facts in the cases by them cited. The cases cited by counsel for the accused in this connection are cases that deal principally upon the shifting of the burden of proof, and they hold correctly that the burden of proof in a criminal case is never shifted to the accused, whether the defense is that of an alibi, or any other legitimate defense, holding that a defendant in a criminal action is presumed to be innocent until the contrary is proven. In case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted. There is no such question in the record in the case at bar. The opinion of this court in this case would undoubtedly be in accordance with the many well-decided cases cited by the accused were the facts in harmony with said cases.

Coming now to instruction No. 18, complained of by the accused, which reads:

"If you find from the evidence that the deceased was the aggressor in the difficulty which resulted in her death, and made such assault with a revolver as aforesaid, the defendant in such case would have the right to use all necessary force to prevent the accomplishment of the apparent, threatened design; and if in so doing the revolver was discharged because of the act of the defendant, resulting in the death of the deceased, when in fact there was no intent on the defendant's part to cause such revolver to be discharged, and no intent to cause the death of the deceased by the act then performed, then and under such circumstances he would not be guilty of the crime charged against him, and you should so find in your verdict."

Counsel claims that the court erred, in the first part of this instruction, in assuming that the evidence on behalf of the accused showed that the gun was in the hand of the deceased when the fatal shot was fired, and that the shots were accidental, and that by so charging the trial court invaded the province of the jury in passing on a question of fact. We cannot take this view of this charge. One of two things are true: (1) The shots were either fired while the pistol was in the hand of the deceased, and the pistol was discharged during the scuffle which ensued between them by the accused in seeking to prevent the deceased from injuring or killing him; (2) or the shots were fired by the hand of the accused. The charge complained of, taken in connection with the whole charge, does not authorize the jury to draw the conclusion therefrom contended for by the accused. It is true that the accused has testified that he is unable to give a clear account of the things that happened immediately preceding and during the time the shots were fired which caused the death of the deceased, but the jury had a right to take into consideration, and doubtless did, all the facts and circumstances as they were developed and established by all the testimony, taking into consideration the location of the wounds, the point of entrance, range, and exit thereof, the size and relative strength of both the accused and deceased; and the jury may have justly come to the conclusion that it was absolutely physically impossibile for the wounds to have been inflicted while the pistol was in the hand of the deceased, and that they refused to believe the evidence and theory of the accused in the light of all the facts and circumstances. The charge, taken as a whole, fully and properly protected the rights of the accused in the light of the evidence . The accused urges with much force that the testimony shows the accused was shot in the back of the head with a revolver by the deceased. This fact, as well as all other facts in the case, being purely within the province of the jury to determine, and there being considerable conflict of testimony on this point, the jury, as reflected from their verdict, simply disbelieved (as they had a right to) the testimony of the accused; several witnesses having testified immediately after the shooting that they made search for, but were unable to find, a bullet hole, or holes in the wall of the house at a point near where the typewriter table, and to which the accused was about to sit at the time he claims the shot was fired by the deceased, and which inflicted the scalp wound on his head. It is true that some weeks after, as shown by the witnesses for the accused, a bullet hole, or what looked like a bullet hole, was found. The jury had a right to believe or disbelieve either or all of the witnesses who testified regarding the bullet hole being there or not, and we do not say the jury was not right in its conclusion upon the facts in this connection. We do not believe, in the light of the testimony, the charge was prejudicial to the rights of the accused.

The remaining question made by the record, and presented to this court for consideration, relates to the amended or supplemental motion for a new trial, predicated upon newly discovered evidence. We have carefully read the affidavits in support of said motion, and the affidavit of the county attorney in opposition thereto. From these affidavits it appears that most of the alleged newly discovered evidence was on hand and obtainable at the beginning of the trial in the court below if reasonable diligence had been employed. Much of the evidence in the supporting affidavits would be unimportant, immaterial, and cumulative. We cannot see how the alleged newly discovered facts set forth in the affidavits in support of the amended or supplemental motion for a new trial could change the verdict. There is not a word in said affidavits which throws any light upon the acts of either the deceased or the accused at the time or just before or after the homicide. See *Flohr v. Territory*, 19 Okla. 414, 91 Pac. 712. There was therefore no abuse of discretion by the trial judge in overruling said motion. The record amply and fully supports the verdict and judgment thereon. The rulings and charges of the court are free from reversible error. The judgment of the lower court must therefore be affirmed.

It is therefore ordered by this court that the sheriff of Comanche county, without delay, carry into execution the judgment and sentence of the court below.

FURMAN, PRESIDING JUDGE, and DOYLE, JUDGE, concur.

ON PETITION FOR REHEARING.

Denied July 29, 1909.

1. **APPEAL AND ERROR—Harmless Error—Admission of Evidence.** The admission of incompetent evidence before a jury is not ground for reversal unless it affirmatively appears from the entire testimony in the case that such improper evidence was calculated to influence the jury against the defendant in arriving at a verdict.
2. **SAME.** This court will not reverse a conviction on account of the admission or rejection of evidence unless both error and injury therefrom appears in the record.

(Syllabus by the Court.)

A. J. Morris, *Stillwell H. Russell* and *A. C. Cruce*, for plaintiff in error.

Charles West, Atty. Gen., and *Charles L. Moore*, Asst. Atty. Gen., for the State.

PER CURIAM: It is contended that there is an irreconcilable conflict between the original opinion in this case and the principles announced by this court in the later case of *Price v. United States,* 101 Pac. 1036. If this contention is correct, then this court should recede from its position in the one case or the other.

The gravity of the case and the importance of the question raised has caused the members of this court to re-examine thoroughly the grounds upon which these two cases rest to discover if there is any conflict between them, and, if so, which decision is best supported by reason and authority. Upon this examination we have failed to find any conflict in the principles upon which both cases rest. In both cases it is held that expert evidence should not be received as to matters coming within the common experience of mankind, with reference to which one man is as competent to speak and his opinion is as good as that of another. As to this principle the two cases are agreed. The seeming conflict grows out of the fact that in the *Price Case* the admission of the opinions of the doctors that the arm of the deceased was hanging down by his side at the time that he received the fatal wound, which opinion was based upon the range of the ball through the body of the deceased, was held to be reversible error, because the evidence was not only incompetent, but was upon a pivotal point in the case which might have been decided by the jury in favor of or against the defendant. This point also directly involved the guilt or innocence of the defendant. The incompetent evidence objected to contradicted the evidence for the defense. The evidence of the defendant's guilt was by no means clear, satisfactory and free from doubt. An examination of the *Price Case* will show that without the testimony of the doctors, complained of, there was very little evidence of the guilt of the defendant. It was therefore clear to this court that the jury was influenced by this improper testimony, and, as both error and injury therefrom appeared upon the face of the record, we were compelled to reverse the conviction and grant a new trial.

In this case an entirely different condition of affairs is presented in the record. It is sought to reverse the conviction because two physicians testified that in their opinions the wounds which caused the death of the deceased were not self-inflicted. There is not a single fact in this record, testified to by any one from which a sane jury coud draw the conclusion that these wounds were self-inflicted. If it had been possible for the deceased to have inflicted these wounds upon herself, it was clearly the duty of the eminent counsel for the defendant to have made that possibility appear. Their names are an absolute guarantee that nothing was overlooked or forgotten which would even remotely assist in the defense of their client. This court can safely rest upon the ground that no mistakes were made by counsel for the defense in this case, and that the reason why they did not attempt to show how the wounds upon deceased could have been self-inflicted was because they had found from actual experiments that the thing was a physical impossibility. The admitted facts are that the deceased was a stout, robust woman and weighed over 200 pounds. One shot entered under and behind the left arm and came out near the left nipple. The other ball entered about one inch below the left ear, ranged over the tongue and came out of the right cheek. That when a pistol is discharged with the muzzle against or near to the flesh of a human being, the skin will be black and badly discolored and there will be an orifice there much larger than the bullet or end of the pistol. These conditions did not exist as to the wounds on the neck of the deceased.

These are a few of the undisputed facts that appear in this record. How could these things be true and it be possible for the deceased to have inflicted these wounds upon herself? The undisputed facts of the case proved conclusively that it was impossible. If it had been possible for the deceased, being a stout woman, to reach around and shoot herself under the left ear, holding the pistol so far away from her neck as not to produce the condition described by the undisputed evidence in the record, then how could it be possible, while suffering from the shock of the first wound, for the deceased to reach around her stout body and fire the shot that went under and behind her left arm and came out about the left nipple, and hold the pistol so far away from her body as not to burn her clothing. The same would be true if the wound under the left arm was made by the first shot. As there was no evidence which might have reasonably caused the jury to believe that the wounds upon deceased were self-inflicted, or might have raised a reasonable doubt upon this subject, then the statement of the doctors that in their judgment the wounds were not self-inflicted, while improperly admitted as evidence, was clearly harmless, because they did not contradict any possible conclusion that might have been rationally arrived at by the jury in favor of the defendant.

This brings us to consider the question as to whether the doctrine of harmless error is founded in justice and supported by reason, and as to whether it should be enforced by the courts. All lawyers will agree that there is such a thing as error without injury. But few, if any, of them will admit that the doctrine of harmless error should be applied to any of their cases. It required the passage of over six years before a member of this court could realize that this doctrine had been properly applied to one of his cases. The more we reflect upon the doctrine of harmless error the more clearly we will see that it is in strict harmony with the philosophy of the law, and that its recognition and enforcement by the appellate court is absolutely necessary for the administration of justice. The admission of the class of expert evidence condemned in both cases was held in this case to be harmless error and in the *Price Case* to be reversible error. Both cases held that the class of alleged expert evidence complained of is improper, and they also both recognize the doctrine of harmless error. Wherein, then, is the conflict in principles between them? If one is right, then the other is right also. If one is wrong, the other is wrong also, unless there is error in the one case or the other in the application of the principles which both announce.

Even under the most strict interpretation of the common law, mathematical certainty of guilt is never required before legal punishment is inflicted. Moral certainty is all that is required. Any other rule would defeat the enforcement of the law. The wisest and best men are painfully conscious of the fact that it is always possible that they may be mistaken as to their most cherished opinions. Owing to the imperfections of sight, and of memory and the inherent defects of the human mind, the most careful and truthful men are often mistaken in their statements of transactions occurring in their presence. Perfection is not an attribute of human nature. Hence it is always possible that mistakes may be made in the trial of any given cause. In fact it may well be doubted if a closely contested case was ever tried without the commission of some error of minor or greater importance. Therefore, if every case in which any error is committed must be reversed, but few, if any, convictions could stand, and law would become a farce and we would be involved in anarchy.

If, upon appeal, the only question to be decided was as to whether or not any error had been committed upon the trial of the case in the court below, without reference to the question of the guilt of the defendant, then the trial judge would be the real defendant and would be upon trial on the appeal, and the guilt of the defendant would become immaterial. Certainly no sane and impartial man should contend for a doctrine which would be so subversive of justice and which would result in such ruinous consequences to the enforcement of criminal law. It would make our courts a mockery, a snare and a delusion. Justice demands that in the administration of law its processes should never be allowed to become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases and has bred a spirit of disgust for law and contempt for courts in the public mind.

Reduced to its last analysis the doctrine contended for by counsel, if recognized, would require this court to hold that where evidence is admitted during a trial, and upon appeal it is held that such evidence was improperly admitted, a reversal of the conviction must follow, regardless of the character of the evidence in the record, upon the ground that the prosecution, having offered this evidence as a part of its case, it is stopped from denying its injurious effect. It appears to us that this application of the doctrine of estoppel, to the state, in the enforcement of its criminal law, on account of the ignorance or mistaken judgment of one of its servants, is technically run mad and gone to seed. We decline to be bound by or to follow a line of authorities so repugnant to reason, so demoralizing to respect for law and so destructive to justice. The habit or reversing cases upon technicalities is a very convenient one for appellate courts, for by so doing they can escape much hard labor and all responsibility for their decisions, for a violation of some technical rule can be found in almost every closely contested case. We believe that appellate courts should faithfully and fearlessly do their duty and decide every question presented, with reference to the substantial merits of the case in which it arises. In this way only can justice be administered.

Ignoring justice and deciding cause upon technicalities has not only largely lost to the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself. No one can say that the members of the American Bar Association are sensationalists or are wanting in learning or ability. It is eminently a conservative body. Yet we find them crying out against and proposing a remedy for this evil. At its last meeting at Seattle, Washington, it recommended to Congress the following amendment to the Revised Statutes of the United States:

"No judgment shall be set aside, or new trial granted, by any court of the United States, in any case civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.—U. S. Comp. Stat. 715.

"No writ of error shall be issued in any criminal sase unless a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted." —U. S. Comp. Stat. 575. (See Green Bag, October, 1908, page 525.)

The same recommendation was adopted by the New York State Bar Association at Buffalo, on January 28th, and 29th, 1909. (See Green Bag for February, 1909.)

While the above resolutions are in stronger language than our statutes upon the same subject, yet they are protests against the same evil, breathe the same spirit and tend in the same direction. While we do not recognize the action of the American Bar Association and of the New York Bar Association as authority, yet we are pleased to know that views which this court has repeatedly expressed in written opinions have found such impartial, able, and conservative indorsements.

Section 5618, Wilson's Rev. & Ann. Stat. 1903, is as follows:

"Sec. 5618 (482). On an appeal the court must give judgment without regard to technical errors or defects, or the exceptions which do not affect the substantial rights of the parties."

It is the fixed purpose of this court to carry out the spirit of this statute, and when a defendant has been properly charged with an offense and fairly tried and the evidence clearly establishes his guilt, this court will not reverse the conviction upon any technicality or exception which did not deprive the defendant of a substantial right. We cannot perform this duty without examining the entire record and going over the entire case. It is true that in the first instance the jury constitutes the triers of the case, but when a defendant by appeal brings a case to this court and thereby invokes our judgment, we cannot act intelligently upon his appeal and determine the application of the legal principle involved to the facts in the case unless we carefully consider the evidence and weigh it just as an intelligent jury should do upon the trial. If we cannot do this, then this court is a miserable and contemptible farce.

There is no more technical court on earth than the Court of Criminal Appeals of Texas. During the earlier days of its existence it did sustain the doctrine for which counsel for defendant contend. Upon reason alone that court now substantially sustains our position in *Jinks v. State,* 33 S. W. 868. Jinks was convicted of murder in the first degree. Certain evidence was admitted which the court held was incompetent. Judge Davidson, in rendering the opinion of the court, said:

"But concede its inadmissibility; should the judgment be reversed? The answer to this question depends upon the nature of the case; that is, the probable effect that it could have had upon the jury, viewed in the light of all the testimony in the case. 'Where evidence of an important fact, material and pertinent to the issue, though additional to other facts legally in evidence, is erroneously admitted, the conviction should be set aside.' But, while this is the rule, reason would suggest an exception thereto. If the incompetent evidence could not have affected the case, there would be no reason in reversing the judgment on account of its admission. . . . Applying this exception, the facts of this case leave not a shadow of a doubt regarding the guilt of the defendant of the offense for which he has been convicted, with the testimony of Miss Maggie May eliminated. That appellant shot and killed the deceased cannot be questioned; that he shot him under circumstances which establish a homicide upon express malice is also evident, if murder upon express malice can be established by the positive proof of a number of witnesses. There is not a break in the testimony that is worthy of consideration, it all tending in the same direction, with the absolute certainty that appellant, with express malice, killed the deceased. No juror, with the least regard to his oath and the testimony in the case, could possibly have any sort of doubt as to the guilt of the appellant of murder in the first degree. This inadmissible testimony could not have had a feather's weight in inducing the jury to believe any fact which was necessary to make a case of murder upon express malice. Again, it could not have prejudiced the appellant, because the jury gave him the lighter punishment. Under such a state of facts, while the testimony of Miss Maggie May may not have been admissible, we do not believe that the judgment should be reversed because of its admission by the court. We have given the record a careful examination, and find no reversible error."

It is worthy of remark that that illustrious jurist, Judge James M. Hurt, who has been most justly praised by counsel for defendant in their brief, participated in the consideration of this case and concurred in the conclusions reached.

John B. Shaw was found guilty of murder and sentenced to be hung. He appealed his case to the Court of Criminal Appeals of Texas. Upon the hearing the court held that the trial court had erred in permitting incompetent evidence to be admitted against the defendant, but, notwithstanding this fact, the conviction was affirmed and Shaw was executed. The case will be found in the 39 Texas Criminal Reports, 161. Judge Hurt rendered the opinion of the court. In giving the reasons why the conviction should be affirmed, he said:

"We have carefully examined the record, and it establishes the guilt of the defendant beyond any question. Lee Wilson, the accomplice, testified positively and directly to the facts attending the killing, and even if we eliminate his testimony, and consider the case solely upon the circumstantial evidence, the guilt of the defendant is established with that degree of certainty required by the rules regulating that character of testimony. The circumstances inherently leave no hypothesis consistent with appellant's innocence, but show conclusively and to a moral certainty that appellant, with his companion Lee Wilson, and no other persons, committed the murder. The record before us shows most astrocious murder, rarely equaled in the annals of any country. The only motive assigned is that appellant coveted the wife of Crane, the deceased. He was the manager of Pierce's ranch; and the deceased, his wife, and three small children were living on the premises, the appellant boarding with them. According to his own account, he was having a liaison with Mrs. Crane, but, not content with this, sought to have her entirely to himself by putting her husband out of the way.

We gather from the testimony that he had been brooding over the matter for some time, for evidently Lee Wilson came to the ranch, stayed all night on the 1st of November, to be in readiness on the morning of the 2d, in pursuance of a conspiracy. Wilson went to the woods, and stationed himself, while appellant hied to the field, where the deceased was engaged in picking cotton, and there decoyed or forced him to mount his horse, and accompany him to the point where Wilson was waiting. There these parties, armed, forced the defendant to go into the thickly wooded pasture (as significant of its character, it is called 'Jungle Pasture'); and thence the testimony shows that they forced him along the canyon, and to a remote and thickened portion of the same. *En route*, appellant cursed and abused him, and told him that he intended to kill him. Twice the deceased attempted to escape, but they pursued and overtook him. Appellant shot him in the back. He fell from his horse. The parties got down and put him on his horse again and, when he had proceeded into a dense thicket, appellant again shot him twice with his winchester. Not content with this, after he had fallen upon the ground, he broke his skull in five or six places with his gun. The parties then separated, Wilson taking a circuitous route back to Cleburne, and appellant returning to the home of the deceased, and then cooly sitting down with the family, and eating dinner. As stated above, few cases equal this in horror, and none surpass it. King David, when he sacrificed Uriah, in order to possess himself a wife, placed him in front of the battle. He was armed, and had some chance for his life; and if he fell, he would at least perish honorably, in defense of his country. But here, instigated by the same character of motive, appellant gave his victim no opportunity whatever. He forced or decoyed him from his labor in the field into the jungle, there not to engage in equal combat, but re-enforced by another, with gun or pistol, set upon and shot him to death, unarmed and helpless, and while fleeing for his life. In our opinion no punishment can be too severe for one who, after having claimed to have debauched the wife, decoys her husband into a jungle, and murders him in the brutal and cowardly manner disclosed in this record. The jury simply did their duty in visiting upon him the highest penalty of the law. We find no error in the record requiring a reversal of the judgment, and it is accordingly affirmed."

Whatever Judge Hurt's views may have been in his younger days, upon the question of harmless error, the cases of *Jinks v. The State,* 33 S. W. 868, and of *Shaw v. The State,* 39 Tex. Crim. Rep. 151, present his mature views, after having spent many years upon the bench and seeing how often justice had been defeated and the guilty had escaped punishment through the mysticism of technicalities.

The conclusions announced in the cases of Jinks and Shaw are not based upon any statute and no authorities are cited in support of them. They are founded alone upon the eternal principles of truth and justice, and as such we give them our hearty approval.

The enforcement of the doctrine of harmless error in Oklahoma will greatly improve the character of our criminal trials. Lawyers will be compelled to try their cases upon their actual merits, and will cease devoting so much time in attempting to force technical errors into the record. The needless waste of much valuable time and the expenditure of a great deal of money will be saved, and far better results will be reached in the administration of justice, and the courts will gain the confidence and respect of the people, and acts of mob violence will cease to disgrace our state.

The reversal of the just convictions of the guilty, upon purely technical questions, is the prime cause of want of confidence in the courts. This want of confidence often results in mob violence on the part of a long-suffering and outraged public. We have the highest possible authority for this statement, for we are told in the Bible that:

"Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil." (Ecclesiastes, 8-11.)

In a public address delivered at Ithca, New York, Hon. Andrew D. White makes this startling but truthful statement:

"While the number of murders is rapidly increasing, the procedure against them is becoming more and more ineffective, and, in the light of recent cases in New York and elsewhere, is seen to be a farce.

"One of the worst results of these causes is the growing opinion among the people at large that men with money can so delay justice by every sort of chicanery that there is a virtual immunity from punishment for the highest crimes."

In a paper presented at the thirty-second annual meeting of the New York State Bar Association, held at Buffalo, January 28th and 29th, Hon. E. P. Wheeler truly says:

"It seems to have been forgotten that society has an interest in the punishment of criminals. All authorities on criminology agree that the certainty of punishment is far more important in the prevention of crime than its severity. The present system tends to make the punishment of crime as uncertain as human laws can make it. The old maxim is forgotten: *Judex damatur cum nocens absolvitur.*

"A favorite devise of the gentlemen who achieve success in the manumission of murderers and the protection of the criminal classes is to apply to a federal judge for a writ of *habeas corpus.* He finds there is no cause for its issue and orders the prisoner remanded. Then an appeal is taken to the Supreme Court and the execution of a just sentence is stayed, while hysterical appeals are being made for pardon. On the other hand, we see the populace, enraged by the delays of justice, engaged in equally hysterical lynching. The innocent suffer. The guilty escape. And we call this civilization."

The original opinion in this case affirming the conviction of the defendant was not based upon the approval by this court of the rulings of the trial court with reference to the admission of the alleged expert testimony, but on the contrary the case was affirmed alone upon the ground that the evidence against the defendant was so overwhelming and conclusive that there could be no other rational deduction drawn therefrom except that the defendant was guilty, and that the evidence objected to was harmless error. An impartial and intelligent jury could not be found who, with a due regard for the unobjectionable testimony in this case and their oaths, could come to any other conclusion than that the defendant unlawfully took the life of the deceased. The evidence all tends in the same direction and, with as near approach to certainty as human testimony can attain, shows that the defendant is guilty. The case could not be made stronger against the defendant than it is made by the testimony which is perfectly competent. Strike out the incompetent evidence and the state's case would not be in any manner weakened. The guilt of the defendant was the only rational conclusion at which the jury could arrive, with the evidence of Drs. Miller and Voyles stricken out. Therefore their evidence could not have affected the case and its admission was harmless error.

The idea that the deceased may have inflicted the wounds upon herself, which caused her death, in the light of the physical facts in this case, is just as unreasonable as the statement of the Roman soldiers that while they slept the disciples came and stole the body of Christ. How could they tell what happened while they slept? How could a 200 pound woman reach around her body and, with a pistol held so far from her that her clothes were not badly scorched, shoot herself under and behind her left arm, and the bullet come out at her left nipple? One statement is just as unbelievable as the other.

We realize that a great responsibility rests upon this court and that we have a sworn duty to perform, and we feel that it would be a crime against society to reverse this conviction, in the light of the entire record in this case. If we thought that the alleged expert evidence in this case could have had any influence upon the jury in convicting the defendant, we would seriously consider the question of granting a new trial. But we could not entertain such an opinion without reflecting upon the intelligence or integrity of the jury. There is nothing in this record which suggests a doubt upon this question. In the face of the entire record we have failed to find any error which would justify us in setting aside the verdict and the judgment of the court rendered thereon. Having arrived at this conclusion after a most painstaking re-investigation of the entire record, our duty is plain.

This court is largely responsible for the property, the liberty, and lives of the people of Oklahoma. Next to honor, human life is the most sacred thing on earth. He who needlessly takes it must be held to a strict responsibility for such action. Laws are made to be enforced. Punishments are prescribed to be inflicted. If men do not respect the law they must at least be made to fear it, and to know that while justice may move with a leaden tread, it crushes with an iron heel.

It is true that the conduct of the deceased is not above criticism. That she conducted herself in a very unwifely manner is conclusively shown from the testimony in this case. But while she gave great offense to her husband, most grievously was she made to suffer for it. If he could not live with her in peace, why did he not separate from her? Her conduct gave him ample justification for so doing. But we are now dealing alone with the question of the guilt of the defendant. There is nothing in the record which justified him in constituting himself sheriff, judge and jury, and to arrest, try, condemn, and execute her without even giving her the opportunity to say, "God have mercy on my soul."

The defendant is the author of his own misfortune. Giving vent to his unlawful and wicked passions has brought him to the position which now confronts him. He has no one except himself to blame for the condition in which he finds himself. We have discussed this question at length, because our criminal jurisprudence is now in its formation period, and we desire the bench and bar to understand fully the reasons and the grounds upon which we base our determination. When a defendant has been properly charged with an offense and fairly tried and convicted, and the evidence sustains the conviction, we will not reverse the case upon any technicality or exception which did not work an injustice to the defendant.

Rehearing denied.

ROPER v. UNITED STATES.

No. 585, Ind. T. Opinion Filed Oct. 16, 1908.

(97 Pac. 1022.)

APPEAL—Rehearing—Substantial Justice. A motion for a rehearing will not be granted, where substantial justice has been done in the original decision, even though all of the reasoning in such opinion is not approved of.

(Syllabus by the Court.)

Appeal from the United States Court for the Central District of Indian Territory; T. C. Humphrey, Judge.

On motion for rehearing. Motion denied.

For former opinion, see 104 S. W. 584.

J. P. Lockwood, for appellant.

W. C. Reeves, Assist. Attorney General, for appellee.

PER CURIAM. Appellant was convicted on the 3d day of October, 1904, of an assault with intent to kill, in the United States Court for the Central District of Indian Territory, sitting at Atoka, and his punishment was assessed at confinement at Fort Leavenworth, in the state of Kansas, for the period of one year and one day. An appeal was prosecuted to the United States Court of Appeals for the Indian Territory. On the 27th day of September, 1907, the judgment of the lower court was affirmed by the appellate court. On the 11th day of October, 1907, a motion for a rehearing was filed. This motion was still pending when the state of Oklahoma was admitted into the Union. This case was then, under the provisions of the Enabling Act and of the Constitution of Oklahoma, transferred to the Supreme Court of Oklahoma. When this court was created, this cause, as directed by statute, was transferred by the Supreme Court to the Criminal Court of Appeals.

We have carefully considered appellant's motion for a rehearing, and have fully examined the entire record in connection with the opinion of the United States Court of Appeals for the Indian Territory. While we are not willing to be bound by all of the reasoning of that court, yet we are of the opinion that the irregularities complained of are not such as would authorize this court to disturb the decision of the United States Court of Appeals for the Indian Territory. The motion for a rehearing is therefore denied.

APPENDIX

ROLL OF ATTORNEYS

The following attorneys, having complied with the Rules for Admission, were duly enrolled in the office of the Supreme Court clerk between November 19, 1907, and September 17, 1909.

A.

Abbott, Chas. P.	Durant
Abbott, Warren D.	Tulsa
Abernathy, G. C.	Pottawatomie Co
Aby, Hulette F.	Tulsa
Acuff, Blaine,	Enid
Adair, J. W.	Bokhoma
Adams, F. M.	Chickasha
Adams, H. M.	Guthrie
Adams, John,	Guthrie
Adams, Jno. O.	Claremore
Adams, J. M.	Ryan
Adams, Percival	Muskogee
Adkins, Chas. H.	Oklahoma City
Admire, Willard H.	Duncan
Ahern, George A.	Frederick
Albert, E. R.	Oklahoma City
Alberty, B. W.	Westville
Alexander, Charles R.,	Woodward
Alexander, Franklin P.,	Frederick
Alexander, M. M.	Okmulgee
Allen, James L.	Muskogee
Allen, Harry K.	Ardmore
Allen, F. B.	Marlow
Allen, R. C.	Coweta
Allen, Frank M.	Muskogee
Allen, N. R.	Muskogee
Allen, W. B.	Dewey
Allen, Jno. T.	Ardmore
Allison, W. M.	Snyder
Ames, C. B.	Oklahoma City
Anderson, A. W.	Woodward
Anderson, A. W.	Henryetta
Anderson, C. M.	Idabel
Anderson, D. W.	Skiatook
Anderson, John F.	Guthrie
Anderson, Jay A.	Muskogee
Anderson, R. S.	Woodward
Anderson, W. N.	Waurika
Andrews, Geo. L.	McAlester
Andrews, L. C.	Pauls Valley
Antony, E. L.	Walters
Antrobus, James H.	Taloga
Appelget, A. M.	Woodward
Apple, Samuel A.	Ardmore
Arington, R. C.	Tecumseh
Armstrong, Eli C.,	McCurtain Co.
Armstrong, J. R.	Boswell
Armstrong, S.	Lawton
Arnold, C. S.	Atoka
Arnold, E. B	Stilwell
Arnote, A. J.	Antlers
Arnote, J. S.	McAlester
Asher, J. H.	Pond Creek
Asher, M. D.	Enid
Asp, Henry E.	Guthrie
Austin, Jno. G.	Grove
Austin, W. C.	Eldorado
Awrey, Chas.	Bartlesville

B.

Babcock, Lucius	El Reno
Bagg, Charles	Muskogee
Bailey, De Roos	Muskogee
Bailey, Frank M.	Chickasha
Bailey, Hiram P.	Weatherford
Bailey, M. G.	Muskogee
Bailey, Stephen D.	Snyder
Bailey, Sam'l F.	Pottawatomie Co.
Bailey, W. A.	Muskogee
Baker, Ed.	Watonga
Baker, Hamilton E.	Okmulgee
Baker, Henry G.	Muskogee
Baker, J. A.	Muskogee
Baker, J. A.	Wewoka
Baker, Tritos	Holdenville
Baldwin, A. M.	Tecumseh
Ballinger, Webster	Ardmore
Bamford, Enoch M.	Guthrie
Banks, Winston	Wewoka
Bannister, C. A.	El Reno
Bardsley, S. J.	Fairview
Barett, Wm. S.	Tulsa
Baring, Chas. T.	Ada
Barrett, Charles F.	Shawnee
Barrett, G. M.	Garvin
Bartlett, Jos. B.	Tulsa
Barefoot, B. B.	Chickasha
Barker, R. U.	Oklahoma City
Barker, Norman	Bartlesville
Barlow, L. H.	Bartlesville
Barnes, Geo. G.	Oklahoma City
Barnes, T. J.	Idabel
Barton, C. O.	Ada
Bass, J. A.	Ardmore
Bassman, W. H.	Claremore
Battenfield, A. Lee	Pryor Creek
Baughman, Homer	Muskogee
Baughman, Ulysses M.	Okla. City
Baxter, Wm. L.	El Reno
Bearden, G. C.	Wagoner
Beatty, William	Shawnee
Beaty, Jno. H.	Oklahoma City
Beauchamp, James K.	Enid
Beavers, Bert J.	Coweta
Becker, J. P.	Medford
Becker, Morris	Oklahoma City
Beckett, A. L.	Stigler
Beeman, A. C.	Cherokee
Beesley, W. C.	Poteau
Beets, A. M.	Foss
Beidleman, George C.,	Okmulgee
Belford, Jabez	Okmulgee
Bell, Fleetwood	Sayre
Bellamy, George W.	El Reno
Bellamy, Jno. M.	Lawton
Belvin, Watson	Durant
Beman, Thomas R.	El Reno
Benge, G. W.	Tahlequah
Bennett, Caswell	Ardmore
Bennett, Chas. Thos.	Pawhuska
Bennett, G. D.	Oklahoma City
Bennett, J. E.	Nowata
Bennett, W. W.	Muskogee
Benson, C. J.	Shawnee
Bentley, Finis	Edmond
Bernstein, Saul K.	Okla. City
Bickel, W. M.	Alva
Biddison, A. J.	Tulsa
Biddison, V. H.	Pawnee
Bierer, A. G.	Guthrie
Biggers, V. R.	Tecumseh
Biglow, G. T.	Muskogee
Billingslea, Ira E.	Lincoln Co.
Billups, R. A.	Cordell
Bingham, George E.	El Reno
Bingham, W. H.	Tishomingo
Bird, J. W.	Pond Creek
Black, Charles C.	Lawton
Black, George E.	Lawton
Black, Oliver C.	Oklahoma City
Blackburn, E. S.	Tulsa
Blair, Charles A.	Guthrie
Blair, Hubbard	Checotah
Blair, Robert F.	Wagoner
Blair, W. B.	Kingfisher
Blake, C. O.	El Reno
Blake, Ernest E.	El Reno
Blake, William	Cleveland
Blakemore, E. P.	Boley
Blakeney, B. B.	Shawnee
Blanchard, J.	Beaver Co.
Bland, William F.	Muskogee
Blanding, U. R.	Lawton
Blanton, J. T.	Pauls Valley
Bleakmore, W. R.	Ardmore
Bledsoe, J. F.	Ardmore
Bledsoe, S. T.	Guthrie
Blezek, J. W.	Lawton
Blinn, Clarence J.,	Oklahoma City
Bliss, Charles W.	Muskogee

Bloomer, Vene	Poteau
Blue, Burdette	Bartlesville
Boardman, H. N.	Watonga
Boggs, Frank W.	Shawnee
Bohannon, Earl	Muskogee
Bohart, J. C.	Chickasha
Bolen, Hubert L.	Oklahoma City
Bolen, James W.	Ada
Boles, John J.	Guthrie
Bolger, P. C.	Poteau
Boling, R. E.	Lindsay
Bond, Edward H.	Duncan
Bond, Reford	Chickasha
Bonds, Archibald	Claremore
Boner, Walter Lee	Durant
Bonested, Floyd J.	McAlester
Boone, R. D.	Pawhuska
Boone, Robert J.	Muskogee
Booth, E. D.	Taloga
Bostick, Charles R.	Perry
Botsford, Charles L.	Norman
Bourland, Wm. F.	Ardmore
Bowdre, W. H.	Watonga
Bowles, Alfred W.	Guthrie
Bowles, W. M.	Perry
Bowman, George L.	Kingfisher
Bowman, W. F.	Ardmore
Boyd, E. Allan	McAlester
Boyd, Jno. P.	Muskogee
Boynton, F. L.	Kingfisher
Bozarth, Charles G.	Atoka
Bozarth, Mark L.	Okmulgee
Bradley, Chris M.	Muskogee
Bradley, E. M.	Hobart
Bradley, John T.	Kingfisher
Bradley, John T. Jr.	Kingfisher
Brady, J. W.	Muskogee
Brainerd, Ezra, Jr.	Muskogee
Branson, Fred P.	Muskogee
Brasted, Fred	Oklahoma City
Braucht, H. S.	Newkirk
Breckenridge, M. A.	Tulsa
Breeden, Emery H.	Medford
Breedlove, James W.	Sallisaw
Brennan, John H.	Bartlesville
Brents, T. E.	Ada
Brett, John Fred	Muskogee
Brett, Rutherford	Cordell
Brewer, C. W.	Okemah
Brewer, P. D.	McAlester
Brewster, A. C.	Pryor Creek
Bridges, David M.	Chickasha
Briggs, William A.	Woodward
Brigham, Wm. A.	Coweta
Bristow, Andrew J.	Coalgate
Broadbent, H. W.	Sulphur
Broaduss, Elbridge	De Val
Brook, Eck E.	Muskogee
Brooke, C. R.	Oklahoma City
Brooks, J. W.	Pottawatomie Co.
Brown, A. Dwight	Lehigh
Brown, G. A.	Mangum
Brown, G. W. P.	Muskogee
Brown, Geo. T.	Tulsa
Brown, Milton	Guthrie
Brown, H. H.	Ardmore
Brown, H. S.	Cordell
Brown, J. L.	Oklahoma City
Brown, W. H.	Sallisaw
Brown, R. H.	Duncan
Brown, T. L.	Claremore
Brown, T. S. E.	Ardmore
Brown, Tracey	Muskogee
Brown, Virgil H.	Newkirk
Brown, Warren H.	Sapulpa
Brown, W. H.	Stigler
Brownlee, Emory C.	Kingfisher
Brownlee, Harry C.	Guthrie
Bruce, C. P.	Garvin
Brunson, David D.	Coalgate
Brunt, J. A.	Okemah
Bryan, Milton	Shawnee
Buchanan, Bayard T.	Okmulgee
Bucher, Carroll S.	Muskogee
Buckley, W. D.	Poteau
Buckner, C. R.	Guthrie
Buckner, D. W.	Enid
Buckner, Geo. W.	Enid
Buell, J. Garfield	Muskogee
Bullock, Arden L.	Roff
Bulow, Henry G.	Arapaho
Bunn, C. O.	Ardmore
Burdick, C. L.	Stillwater
Burford, F. B.	Washington Co.
Burford, John H.	Guthrie
Burger, John S.	Blackwell
Burlingame, E. P.	Guthrie
Burlingame, Peter L.	Muskogee
Burnett, S. C.	Cordell
Burns, John L.	Perkins
Burns, R. E.	Cushing
Burns, William Robert	Duncan
Burt, Leroy J.	Sapulpa
Burton, A. J.	Lawton

Burwell, Benj. F.	Okla. City
Burwell, Newton	Enid
Butler, Jeter	Checotah
Butler, Sam H.	Ardmore
Butterworth, C. W.	Tulsa
Butts, Geo. C.	Muskogee
Butts, Rutherford B.	Muskogee
Byers, Samuel A.	Oklahoma City
Byington, Henry	Caddo
Bynum, W. D.	Muskogee
Byrd, C. T.	Tulsa
Byrne, J. L.	Creek Co.

C.

Cabell, J. V.	Ardmore
Cade, Wm. S.	Shawnee
Cadel, John S.	Ardmore
Cahill, L. E.	Hobart
Caldwell, Fred S.	Oklahoma City
Calhoun, Samuel A.	Okla. City
Calhoun, Wm. W.	Wagoner
Calvert, J. L.	Guthrie
Cameron, E. D.	Guthrie
Campbell, Harry	Tulsa
Campbell, Newlin	Bartlesville
Campbell, R. M.	Oklahoma City
Campbell, W. H. L.	Ada
Causler, Polk	Enid
Cardwell, James C.	Weatherford
Carey, Patrick	Oklahoma City
Carlisle, H. S.	Oklahoma City
Carlton, A. J.	McLoud
Carmichael, J. D.	Chickasha
Carney, John J.	El Reno
Carpenter, J. L.	Mangum
Carr, H. M.	Pauls Valley
Carr, T. G.	Garvin
Carr, Wm. O.	Muskogee
Carroll, Gray	Tulsa
Carswell, C. H.	Anadarko
Carter, Dorset	Purcell
Carter, Geo. S.	Noble Co.
Case, Chas. B.	Anadarko
Cassidy, Ed. O.	Guthrie
Cassidy, P. O.	Shawnee
Cassity, Galen E.	Okmulgee
Castle, Cornelius E.	Wagoner
Caudill, W. C.	Bokchito
Caudill, Wm. M.	Frederick
Cavender, S. C.	Porum
Cavitt, F. O.	Tulsa
Chambers, E.	Oklahoma City
Chambers, James H.	Atoka
Chambers, Joe	Claremore
Chambers, Thos. G.	Okla. City
Champion, J. B.	Ardmore
Champion, Thos. W.	Ardmore
Chapman, Wm. L.	Guthrie
Chappell, F. E.	Guthrie
Chappell, G. A.	Newkirk
Chappelle, Jno. D.	Guthrie
Charlton, J. R.	Bartlesville
Chase, W. A.	Nowata
Chase, W. L.	Westville
Cheadle, John B.	Alva
Cheatham, Wm. L.	Creek Co.
Cherryhomes, J. W.	Lawton
Childers, Joseph W.	Okmulgee
Childers, J. H.	Muskogee
Christison, Cicero C.	Okla. City
Church, H. T.	Wilburton
Church, Wm. T.	Enid
Clap, T. P.	Mangum
Clapham, Wm. E.	Alva
Clapp, John H.	Wagoner
Clapp, John H.	Okmulgee
Clapp, A. W.	Muskogee
Clark, Adolphus	Chickasha
Clark, C. O.	Lawton
Clark, Edwin O.	Stigler
Clark, E. M.	Pawnee
Clark, Geo. W.	Oklahoma City
Clark, Geo. F.	McAlester
Clark, J. W.	El Reno
Clark, J. W.	Atoka
Clark, Josiah	Ardmore
Clark, Lawrence H.	Arnett
Clark, Leigh W.	Oklahoma City
Clark, T. T.	Altus
Clark, W. B.	Ponca City
Clark, Wm. M.	Cosmos
Clarke, E. F.	Woodward
Clay, Colonel L.	Hobart
Clayton, Wm. H. H.	McAlester
Clevinger, J. W.	Enid
Clift, J. R.	Eschiti
Clift, Thomas R.	Guthrie
Cline, W. S.	Newkirk
Clough, Samuel	Thomas
Coakley, Chas. A.	Madill
Cobb, T. S.	Wewoka
Cochran, A. D.	Okmulgee

Cochran, A. G.	Muskogee
Cochran, Edgar E.	Valliant
Cochran, C. B.	Durant
Cochran, C. L.	Chelsea
Cocke, John	Antlers
Coffee, R. N.	Pauls Valley
Coffman, J. L.	Holdenville
Coffman, John L.	Frederick
Cofield, W. H.	Alva
Cogdel, W. E.	Enid
Cole, Homer A.	Ponca City
Cole, Jas. R.	Atoka
Cole, R. S.	Pawnee
Cole, Preslie B.	McAlester
Coll, Robt. F.	Muskogee
Collett, A. J.	Tulsa
Collier, Wm. A.	Eufaula
Comstock, Allen W.	Ponca City
Conant, F. M.	
Conkling, Lucius M.	Enid
Conley, H. T.	Pawnee
Connell, J. R.	Durant
Connell, J. V.	Durant
Connella, Rufus R.	Lawton
Conner, Benj. C.	Tulsa
Conner, C. B.	Pottawatomie Co.
Connor, Thos. W.	Hobart
Cook, Charles Ashton	Muskogee
Cook, Thomas U.	Thomas
Cook, W. S.	Thomas
Cooper, Oscar	Kiefer
Cooper, Paul F.	Pawnee
Cope, M. B.	El Reno
Coppidge, A. V.	Grove
Corley, W. A.	Muskogee
Cornell, Geo. W.	Weatherford
Corry, B. F.	Sulphur
Costello, Frank	Hobart
Cotner, James A.	Ardmore
Cottingham, J. R.	Guthrie
Couch, R. H.	Tahlequah
Coughlin, Walter L.	Frederick
Coursey, J. D.	Tahlequah
Cowan, J. A.	Moore
Cowgill, F. M.	Alva
Cowley, Lawrence L.	Perry
Cox, Chas. A.	Oklahoma City
Cox, Irving H.	Okmulgee
Cox, J. D.	Tahlequah
Cox, M. D. Lecompton	Guthrie
Cox, S. B.	Okmulgee
Craig, E. R.	McAlester
Craig, Frank	McAlester
Crain, Kenneth	Wagoner
Cramer, Oliver E.	Muskogee
Craver, A. E.	Bartlesville
Crawford, J. P.	Ada
Cress, Parker W.	Perry
Crewson, D. B.	Tulsa
Criley, Wm. H.	El Reno
Crittenden, Wm. L.	Stigler
Crockett, Albert P.	Okla. City
Crockett, Robert	Durant
Cromwell, W. O.	Enid
Crook, J. M.	Durant
Crosby, Thos. F.	Muskogee
Crosby, W. A.	Muskogee
Crossan, W. B.	Shawnee
Crouch, J. B.	Porum
Crow, W. C.	Guymon
Crowell, C. M.	Wapanucka
Croxton, A. M.	Ada
Cruce, A. C.	Ardmore
Cruce, W. I.	Ardmore
Cruce, Lee	Ardmore
Crump, Arch M.	Holdenville
Crump, Geo. C.	Wewoka
Crump, W. J.	Muskogee
Cruthis, Jos. H.	Talihina
Cullison, James B.	Enid
Cullom, H. E.	Lehigh
Culwell, J. W.	Beaver
Cunningham, Harrison E.	Durant
Cunningham, D. K.	Kingfisher
Cunningham, Harper S.	Guthrie
Cunningham, S. M.	Lawton
Curd, Edw. Jr.	Muskogee
Curran, James E.	Blackwell
Curran, John F.	Enid
Currie, W. G.	Ada
Curry, Guy A.	Quinton
Curtis, W. L.	Sallisaw
Curtyss, Hill Cecil	Guymon
Cutlip, C. G.	Wewoka
Cutlip, T. G.	Shawnee
Cutler, Clinton E. B.	Lehigh

D.

Daggett, A. E.	Avard
Dale, Frank	Guthrie
Dalton, Elmo M.	Stigler
Dance, Geo. N.	Blackwell

Daniel, Thos. W.	Idabel
Daniels, Jno. E.	Muskogee
Darnell, A. E.	Foss
Darnell, G. C.	Foss
Davenport, C. J.	Pauls Valley
Davenport, James S.	Vinita
Davenport, K. H.	Bartlesville
Davenport, L. P.	Antlers
Davenport, R. E.	Chickasha
Davidson, Alex. A.	Muskogee
Davidson, R. L.	Tulsa
Davidson, T. H.	Stigler
Davis, B. F.	Wewoka
Davis, Clarence	Bristow
Davis, Geo. O.	Weatherford
Davis, H. S.	Lawton
Davis, Harry G.	Muskogee
Davis, J. C.	Wewoka
Davis, Josiah G.	Sapulpa
Davis, John J.	Chandler
Davis, Louis	Lawton
Davis, P. S.	Vinita
Davis, T. J.	Lawton
Davis, Wm. P.	Ardmore
Daws, S. B.	Muskogee
Day, J. P.	Poteau
Day, Ralph W.	Oklahoma City
Dean, J. R.	Woodward
Dean, J. W.	Ada
Decius, Lyle	Muskogee
Deck, Geo. F.	Durant
Deck, M. D.	Bennington
Deckard, Lex. V.	Okmulgee
Decker, S. T.	Chandler
Decker, V. S.	Chandler
Deen, E. L.	Ardmore
DeGraffenreid, R. F.	Muskogee
DeGroot, John L.	Muskogee
Deichman, Peter	Tulsa
DeMeules, Edgar A.	Muskogee
Denman, D. H.	Fairview
Denman, Stanley H.	Lawton
Dennis, M. A.	Enid
Dennison, Geo. B.	Vinita
Denton, James C.	Nowata
Denton, Robt. L.	Enid
Detrick, E. O.	Bartlesville
Devereux, John	Guthrie
Dial, W. H.	Frederick
Dick, E. J.	Buffalo
Dick, R. M.	Newkirk
Dick, R. W.	Ardmore
Dickerson, J. T.	Chickasha
Dickey, David F.	Muskogee
Dickson, Albert S.	Beaver
Dickson, Robt. E.	Beaver
Dickson, T. A.	Grant
Dickworth, I. C.	Pryor Creek
Diffendaffer, J. A.	Lawton
Dillard, Hays	Waurika
Dillard, J. M.	Altus
Disney, Ernest	Muskogee
Dixon, W. T.	Lawton
Dodson, J. M.	Enid
Dolman, L. S.	Ardmore
Don Carlos, C. C.	Sapulpa
Donohue, Wm. J.	El Reno
Doolin, John B.	Alva
Downing, H. B.	Atoka
Downs, Stephen	Boswell
Doyle, Thos. H.	Perry
Doyle, T. T.	Okfuskee Co.
Drake, Wm. F.	Wagoner
Drane, J. A.	McAlester
Drennan, J. B.	Pond Creek
DuBois, T. H.	Poteau
Dudley, Chas. E.	Antlers
Dudley, J. B.	Norman
Duff, J. A.	Cordell
Duffy, W. M.	Checotah
DuMars, John E.	Oklahoma City
Dumenil, A. F.	Bartlesville
Dunham, Chas. P.	Pond Creek
Dunlap, H. M.	Caddo
Dunn, Jesse J.	Alva
Durant, Horace B.	Miami
Durant, W. A.	Durant
Durham, W. F.	Tecumseh
Dyer, Chas. F.	Watonga

E.

Eacock, Geo. J.	Oklahoma City
Eagin, Frank	Mangum
Eagleton, W. L.	Pawnee
Earl, John C.	Garvin
Earl, W. E.	Lawton
Earley, A. T.	Oklahoma City
Easton, Eugene	Antlers
Eaton, Jos. S.	Okmulgee

Echols, R. E.	Elk City
Eddleman, A.	Marietta
Eddleman, E.	Marietta
Edgington, L. D.	Hominy
Edmister, Stanley C.	Cleveland
Edmonson, R. B.	Billings
Edwards, Gasper	Oklahoma City
Edwards, H. R.	Guthrie
Edwards, Jos. A.	Stratford
Edwards, T. A.	Cordell
Edwards, W. C.	Ada
Eggerman, Don G.	Shawnee
Eichling, F. B.	Porum
Elder, Howard E.	Oklahoma City
Elkin, Fred M.	Guthrie
Elledge, W. L.	Caney
Ellerbee, A. A.	Braden
Elliott, R. P.	Tulsa
Elliott, Thos. E.	Nowata
Ellison, R. H.	Okmulgee
Elrod, Walter D.	Okmulgee
Elting, C. H.	Durant
Embry, John	Guthrie
Emery, A. L.	Watonga
Emmanuel, Chas. B.	Sulphur
Enderlein, Theo. H.	Okla. City
Engart, W. M.	Tecumseh
Englesman, A. B.	Oklahoma City
Ennis, Chester H.	Ada
Epperson, Benj. H.	Ada
Erixon, Gustave A.	Guthrie
Eslick, Merrett	Muskogee
Estes, J. S.	Sulphur
Etheridge, A. G.	Hugo
Eubanks, Ira N.	McAlester
Evans, Geo. H.	Chickasha
Evans, O. M.	
Evans, R. L.	Hugo
Evans, T. D.	Tulsa
Everest, J. H.	Oklahoma City
Ewers, J. J.	Tahlequah
Ezzard, John T.	Chelsea

F.

Fain, J. A.	Lawton
Fairchild, A.	Fairview
Fancher, Tom H.	Holdenville
Fannin, Fred H.	Stigler
Fant, Leon B.	Wagoner
Faris, J. M.	
Farmer, Andrew J.	Clinton
Farmer, Winfield S.	Atoka
Farnsworth, Jay P.	Muskogee
Farrar, Thos. J.	Vinita
Fawcett, S. S.	Hughes Co.
Fears, Walter T.	McIntosh Co.
Fecheimer, Chas. M.	Chickasha
Fegan, O. R.	Guthrie
Ferguson, A. H.	Durant
Ferguson, Geo. W.	Watonga
Fernandes, D. H.	Guthrie
Ficher, H. S.	Medford
Field, John Walker	Norman
Fielding, H. W.	Sulphur
Fisher, A. W.	Pryor Creek
Fisher, H. S.	Grant Co.
Fitzgerald, E. C.	Miami
Fitzpatrick, Kirby	McAlester
Fleming, E. H.	Muskogee
Flesher, N. B.	Okemah
Flynn, Dennis T.	Oklahoma City
Fogg, Harry L.	El Reno
Fogle, Geo. P.	Vinita
Foose, Seymour	Watonga
Fooshee, Geo. C.	Coalgate
Ford, Chas. P.	Guthrie
Ford, Jos. W.	Waurika
Fore, Jos. H.	Wagoner
Foreman, Grant	Muskogee
Foster, B. B.	Bartlesville
Foster, Emery A.	Chandler
Foster, Ephraim H.	Hugo
Foster, J. W.	Stigler
Foster, L. A.	Woodward
Foster, Wm. E.	Okmulgee
Fowler, H. J.	Poteau
Fowler, Oscar R.	Durant
Franklin, B. C.	Ardmore
Franklin, Ben	Purcell
Franklin, J. H.	Lawton
Franklin, W. C.	Muskogee
Franklin, Wirt	Ardmore
Franklin, Wm. M.	Madill
Frantz, Frank	Enid
Frederick, John W.	Stigler
Freeling, S. P.	Shawnee
Freeman, Chas. R.	Checotah
Freeman, W. F.	Ardmore
Freeman, Wm. P.	McAlester
Frerichs, Marten L.	Okemah

Frye, E. M.	Sallisaw
Fulkerson, T. D.	Ottawa Co.
Fuller, Wm. H.	McAlester
Fulton, Elmer L.,	Oklahoma City
Fulton, Marshall,	Oklahoma City
Funk, Jno. L.	El Reno
Furman, Henry M.	Ada
Furry, James B.	Muskogee

G.

Gahan, Wm. J.	Oklahoma City
Galbraith, C. A.	Ada
Galloway, Jas. O.	Duncan
Galyen, R. H.	Apache
Gamble, Robert S.	Okmulgee
Gardner, Neil B.	Ft. Supply
Gardner, P. W.	Holdenville
Garis, Adam S.	Enid
Garner, E. M.	Ponca City
Garrett, A. R.	Mangum
Garrett, B. F.	Guthrie
Garrett, Marion L.	Tishomingo
Garrett, P. L.	Okmulgee
Garrett, S. B.	Mangum
Gaskill, J. F.	Muskogee
Gay, Kent B.	McAlester
Gensman, L. M.	Lawton
George, H. T.	McAlester
George, Tom,	Bartlesville
George, H. F.	McAlester
German, W. P. Z.	Muskogee
Gernert, Jas. H.	Atoka
Gibbens, E. E.	Perry
Gibbs, W. D.	Ardmore
Gibson, C. T.	Lehigh
Gibson, N. A.	McAlester
Giddings, E. J.	Oklahoma City
Gidney, Samuel E.	Muskogee
Gifford, J. S.	Enid
Gilbert, W. I.	Duncan
Gilbertson, Otho T.	Muskogee
Gilkerson, C. S.	Elk City
Gill, Joseph A.	Craig Co.
Gillette, F. E.	El Reno
Gillaley, Wm. F.	Nowata
Gipson, E. H.	Sayre
Givens, James M.	Muskogee
Gladish, J. S.	Guthrie
Glasco, E. E.	Purcell
Glass, Merrett J.	Lawton
Glasser, Harry O.	Enid
Glaze, Geo. P.	Oklahoma City
Gleason, Jno. L.	Guymon
Glenn, A. C.	Pond Creek
Glenn, W. T.	Hugo
Godbey, Robt. W.	Apache
Glitsch, Carl S.	Oklahoma City
Goode, Mark	Norman
Goodlove, H. C.	Ryan
Goodrich, Fred S.,	Oklahoma City
Goodwin, G. W.	Cleveland
Goodwin, J. E.	Oklahoma City
Gorden, Geo. W.	Wilburton
Gordon, I. J.	Wanette
Gordon, James H.	McAlester
Gore, David B.	Tulsa
Gormley, Clarence W.	Tulsa
Gotwalls, C. P.	Muskogee
Gourley, Austin R.,	Oklahoma City
Graham, Geo. G.	Norman
Graham, J. C.	Marietta
Graham, John M.	Kingfisher
Grant, James H.,	Oklahoma City
Grant, Whit. M.	Oklahoma City
Grason, R. E.	Boynton
Graves, Eugene L.	Pittsburg Co.
Graves, Geo. T.	Pawnee
Graves, Geo. T.	Cleveland
Gray, Henry M.	Oklahoma City
Gray, Lee M.	Hennessey
Green, Charlotte I.,	Oklahoma City
Green, Ernest L.,	Oklahoma City
Green, Fred M.	Guthrie
Green, Geo. M.	Guthrie
Green, Hazen	Eufaula
Green, Guy	
Green, John B.	Oklahoma City
Green, Maurice D.	Muskogee
Green, Thos. F.	Purcell
Green, Wm. A.	Muskogee
Greene, W. N.	Enid
Greene, W. N.	Ft. Towson
Greenslade, Rush	Muskogee
Gregg, W. J.	Tulsa
Gresham, James M.	Norman
Gresham, Wm. W.	Wagoner
Griesel, Edw. C.	Muskogee
Griffin, W. W.	Frederick

Griffiths, Edwin P. ... Muskogee
Griffitts, J. L. .... Newkirk
Grigsby, H. L. .... Chickasha
Grigsby, J. E. .... Ada
Grigsby, Jesse D. .... Norman
Grimes, Chas. W. .... Tulsa
Grimm, S. .... Grand
Grinstead, E. E. ...... Pawhuska
Gross, Benj. .... Hugo
Gross, M. W. .... Hugo
Grove, J. P. .... Alva
Gubser, Nichols .... Tulsa
Guest, J. L. Q. .... Duncan
Guffy, E. D. ..... Oklahoma City
Gullett, Alexander .. Tishomingo
Gurley, Herman S. ..... Blackwell
Gust, Carl W. .... Eufaula
Gustin, F. M. .... Cherokee

H.

Hackett, S. C. .... Antlers
Hailey, D. M. .... McAlester
Hainer, Bayard T. .... Perry
Hale, Jas. W. .... Poteau
Halfhill, Wm. D. ...... Muskogee
Hall, J. K. .... Altus
Hall, Jno. T. .... Okmulgee
Hall, Wm. M. .... Claremore
Halstead, S. R. .... Cherokee
Hamill, James N. .... Lawton
Hamilton, E. .... Chickasha
Hamilton, Wm. B. ..... Mangum
Hammond, B. Pope ... McAlester
Hammonds, A. E. .... Lawton
Hammonds, H. C. .... Lawton
Hampton, L. H. .... Watonga
Hankins, M. L. .... Altus
Hanna, H. W. .... Lawton
Hanod, Jno. Q. A. .... Durant
Hanson, A T. .... Nowata
Hardie, Ralph C. .... Norman
Hardin, Lewis A. .... Holdenville
Hardison, T. S. .... Hugo
Hardy, Cornelius .. Tishomingo
Hardy, Summers .... Madill
Hargis, H. C. .... Pawhuska
Harley, J. G. .... McAlester
Harmon, Chas. N. .... Enid
Harnage, Jesse L. .... Tulsa
Harper, J. H. .... Ryan
Harper, William P. ...Okla. City
Harris, J. G. .... Hobart
Harris, J. H. .... Guymon
Harris, Samuel H. ....Okla. City
Harris, Vernon V. ...... Wewoka
Harris, Wm. P. .... Muskogee
Harrison, J. B. .... Sayre
Harrison, L. D. ...... Collinsville
Harrison, R. P. .... Muskogee
Harrison, Williams....Okla. City
Harrison, W. H. .... Poteau
Harrold, J. W. .... Ardmore
Hartman, W. T. J. ... Bartlesville
Harvey, E. E. .... Tulsa
Haskell, C. N. .... Guthrie
Haskell, Norman R. .. Muskogee
Hastain, Ed. .... Muskogee
Hastings, Edward .. Pauls Valley
Hastings, Wm. W. ... Tahlequah
Hatch, A. A. .... Weleetka
Hatchett, Claude C. ..... Durant
Hatchett, Jesse M. ...... Durant
Haver, John A. .... Tulsa
Hawley, Geo. A. ..... Bennington
Hayes, J. M. .... Guthrie
Hayes, Samuel W. .... Chickasha
Hayes, V. B. .... Durant
Haynes, F. L. .... Tulsa
Hays, John T. .... Hobart
Hays, R. G. ....
Hayson, John W., Oklahoma City
Hazelwood, Tom ...... Weleetka
Head, Hugh L. .... Muskogee
Healy, Geo. H. .... Beaver
Heaton, Ross J. ..... Bartlesville
Heckaman, S. D. .... Shawnee
Hegler, Benj. F. .... Guthrie
Helsell, Charles A. .... Enid
Henderson, Marion, Pauls Valley
Henderson, William C. .. Lawton
Hendricks, Jno. H. .... Hugo
Hendrix, J. C. .... Sayre
Henry, H. D. .... Mangum
Hensley, Travis S. ..... El Reno
Henshaw, G. A. .... Guthrie
Hepburn, James .... Guthrie
Herod, C. W. .... Woodward
Herod, W. B. .... Guthrie

Herr, A. L.	Chickasha
Herschelman, D. R.	Porum
Heskett, F. H.	Anadarko
Hiatt, William A.	Muskogee
Hickam, J. P.	Perkins
Hickok, W. P.	Dewey Co.
Highley, Mont. F.	Oklahoma City
Hildreth, J. J.	Guthrie
Hildt, J. E.	Wagoner
Hill, Edward P.	McAlester
Hill, Geo. S.	Bartlesville
Hill, H. L.	Hugo
Hill, Jesse H.	Muskogee
Hilton, S. H.	Luther
Himes, E. Wade	Guymon
Hinch, M. W.	Kingfisher
Hindman, C. J.	Tulsa
Hinkle, John	Ardmore
Hinsley, T. M.	Durant
Hinson, Marvin G.	Checotah
Hinson, Thos. G.	Checotah
Hirsch, Ed.	Muskogee
Hoag, Charles W.	Oklahoma City
Hobbs, Virgil M.	Guthrie
Hobdy, E. J.	Bluejacket
Hocker, J. W.	Purcell
Hodges, Samuel H.	Frederick
Hoffman, Roy	Chandler
Holbrook, C. W.	Okmulgee
Holcomb, M. A.	Okmulgee
Holcombe, Marion L.	Clinton
Holdeman, Orlando	Wagoner
Holley, G. A.	Stigler
Holliday, S. L.	Oklahoma City
Holt, Clarence P.	Tecumseh
Holt, Z. I. J.	Broken Arrow
Holt, Thomas P.	Ada
Homer, J. L.	Muskogee
Homer, Sol J.	Caddo
Honnold, A. B.	Oklahoma City
Hood, E. E.	Shawnee
Hoodenpyl, Geo. L.	Boswell
Hopkins, Philip B.	Muskogee
Hopper, Wm. T.	Rush Springs
Hopps, Howard S.	Guthrie
Horbisson, I. E.	Eldorado
Hornor, C. G.	Guthrie
Horton, Guy P.	Altus
Horton, F. A.	Oklahoma City
Horton, L. D.	Durant
Hotchkiss, E. L.	Watonga
Houck, Adrain T.	Tulsa
Houssels, R. S.	Frederick
Houston, R. K.	Grady Co.
Howard, J. I.	Foss
Howard, R. A.	Ardmore
Howe, C. H.	Hugo
Howell, Edward	Shawnee
Howser, M. P.	Tulsa
Howsley, R. L.	Guymon
Hubbell, O. D.	Enid
Huddleston, C. T.	Okemah
Hudson, Chas. H.	Wilburton
Hudson, G. D.	Cushing
Hudson, J. F.	McCurtain
Hudson, R. H.	Perry
Huett, Daniel	Enid
Huffar, D. W.	Ada
Hughes, Adelbert	Guthrie
Hughes, Ernest B.	Sapulpa
Hughes, Judson J.	Coweta
Hughes, P. C.	Elk City
Hughes, W. C.	Oklahoma City
Hughes, W. G.	Texas Co.
Hull, Theodore H.	Bartlesville
Hulsey, Wm. J.	Hartshorne
Hume, C. Ross	Anadarko
Humphrey, J. E.	Ardmore
Humphrey, J. M.	Atoka
Humphrey, Thomas C.	Hugo
Humphrey, Walter	Nowata
Hunt, F. C.	Guthrie
Hunt, H. W.	Waurika
Hunt, W. T.	Wagoner
Hunt, E. B.	Grove
Hunter, Chas. E.	Guthrie
Hunter, J. R.	Hobart
Hunter, John S.	Oklahoma City
Hurley, P. J.	Tulsa
Huser, W. A.	Hastings
Hussey, William Henry	Lawton
Huston, A. H.	Guthrie
Hutchin, A.	Lexington
Hutchings, Wm. T.	Muskogee
Hutton, Arthur P.	Oklahoma City
Hyams, W. W.	Tulsa
Hyde, John Q.	McAlester
Hyndman, John A.	Hobart

I.

Isbel, Benj. E.	Idabel
Ingersoll, C. S.	Pond Creek

J.

Jackson, Clifford L. .. Muskogee
Jackson, L. B. .... Sapulpa
Jackson, Robert E. ..... Sallisaw
Jackson, W. C. .... Muskogee
Jackson, William J. .... Norman
Jacobs, F. W. .... Muskogee
Jacobs, Hardin R. .... Purcell
Jacobs, J. C. .... Enid
James, George .... Okmulgee
James, C. M. .... Ardmore
Japp, Amil H. .... Lawton
Jarman, J. H. .... Sallisaw
Jarrett, H. M. .... Stroud
Jefferson, M. H. .... Guthrie
Jenkins, J. S. .... Oklahoma City
Jenkins, W. M. .. Oklahoma City
Jennings, Al. J. .... Lawton
Jennings, S. O. .... Wewoka
Jennings, Harry ...... Claremore
Jennings, J. D. F., Oklahoma City
Johns, George A. .... Okemah
Johns, Geo. E. .... Coalgate
Johns, W. L. .... Tahlequah
Johnson, A. W. .... Geary
Johnson, Albert P. ... Kiowa Co.
Johnson, B. S. .... Durant
Johnson, Charles E. ..Okla. City
Johnson, David I. .....Okla. City
Johnson, Garfield ..... Muskogee
Johnson, Joseph .... Nowata
Johnson, George F. ... Blanchard
Johnson, H. A. .... Perry
Johnson, H. E. .... Altus
Johnson, J. M. .... Durant
Johnson, J. W. ... Oklahoma City
Johnson, John T. .... Lawton
Johnson, L. H. .... Mulhall
Johnson, T. A. .... Hugo
Johnson, Victor O. ...... Pawnee
Johnson, W. B. .... Ardmore
Johnson, William L. ... Chandler
Johnston, Henry S. .... Perry
Jones, Cham .... Ryan
Jones, Edward R. ..... Muskogee
Jones, J. J. .... Sapulpa
Jones, J. W. .... Atoka
Jones, Olin W. .... Garvin
Jones, Oliver P. .... Tulsa
Jones, Philos S. ...... Wilburton
Jones, Robert T. ... Pauls Valley
Jones, T. W. Jr. .... Weatherford
Jones, Thomas S. .... Guthrie
Jones, W. P. .... Hugo
Jones, Jacob J. .... Muskogee
Jorgenson, P. L. .... Anadarko
Joshua, C. W. .... Coweta
Joyce, Andrew .... Sapulpa
Julian, C. C. .... Bartlesville

K.

Kane, Jno. H. .... Bartlesville
Kane, M. J. .... Guthrie
Kates, Philip .... Tulsa
Kayser, Arthur .... Muskogee
Kean, Louis A. .... Muskogee
Keaton, J. R. .... Oklahoma City
Keenan, Bruce L. .... Tahlequah
Keiger, Charles M. ..... Norman
Keil, Albert H. .... McAlester
Keith, I. P. .... McAlester
Keller, Robt. A. .... Marietta
Kelley, Alfred .... Muskogee
Kellogg, F. H. .... McAlester
Kelsey, Dana H. .... Muskogee
Kendall, D. J. .... Sulphur
Kendricks, Charles B. ..... Davis
Kennemer, F. E. .... Madill
Kleinschmidt, R. A. ...Okla. City
Knapp, W. P. .... Oklahoma City
Kline, Walter .... McAlester
Kline, David A. .... Muskogee
Kerr, Edwin S. .... Roff
Kerr, I. H. .... Anadarko
Key, George D. .... Lawton
Keys, L. M. .... Hobart
Kight, H. Tom ..... Claremore
King, A. J. .... Lawton
King, B. C. .... Ada
King, Frederick ...... Tecumseh
King, Clifford W. .... Hollis
King, I. M. .... Ada
King, Jno. H. .... Muskogee
King, J. F. .... Newkirk
Kinkade, F. V. .... Ardmore
Kister, Ernest L. ..... Muskogee
Knappe, Emil C. .... Lawton

Knowles, Lafe	Hobart
Knott, W. J.	Cordell
Kopplin, Fred W.	Tulsa
Kornegay, W. H.	Vinita
Kroeger, H. A.	Francis
Krug, Alfred M.	Tulsa
Kruse, Carl	Enid
Kryder, R. L.	Okmulgee
Kuykendall, E. H.	Muskogee
Kyle, S. H.	Durant
Kyle, Luther	Sallisaw

L.

Lackey, W. J.	Weatherford
LaHay, Joe M.	Claremore
Laing, George H.	Kingfisher
Lamb, F. F.	Okmulgee
Landrum, E. M.	Tahlequah
Lane, D. A.	Oklahoma City
Langley, J. H.	Pryor Creek
Langston, W. P.	Holdenville
Lasher, Oliver C.	Chandler
Latimer, Walter E.	Sulphur
Latta, Keith N.	Oklahoma City
Lattimore, S. H.	Sapulpa
Laughbaum, H. T.	Okla. City
Laune, S. B.	Woodward
Law, Chas. B.	Muskogee
Lawrence, S. S.	Guthrie
Lawrence, Wm. L.	Tishomingo
Lawrence, Wm. R.	Muskogee
Lawson, Engere B.	Nowata
Lawson, J. H.	Mountain Park
Lawson, Lewis C.	Holdenville
Lawter, J. W.	Custer Co.
Leach, Jos. E.	Pawhuska
League, James R.	Tulsa
Leahy, T. J.	Pawhuska
Leahy, Thos. Wm.	Muskogee
Learnard, O. E. Jr.	Bartlesville
Ledbetter, H. A.	Ardmore
Ledbetter, W. A.	Ardmore
Lee, Albert J.	Ardmore
Lee, Frank E.	Okemah
Lee, J. A.	Enid
Lee, Robert T.	Ardmore
Leedy, Clarence B.	Grand
Leeka, C. O.	Custer City
Leekley, Harlowe A.	Muskogee
Lenau, Chas. W.	Hobart
Leidtke, Wm. C.	McIntosh Co.
Leopold, G. W.	Muskogee
Leonard, Murray B.	Wagoner
Lester, Eugene Fay	Wilburton
Lester, Preston S.	McAlester
Lester, Richard M.	Ardmore
Levy, Harry D.	Muskogee
Lewis, Anson	Pauls Valley
Lewis, Daniel W.	Kingfisher
Lewis, Isaac O.	Madill
Lewis, B. W.	Dewey
Lewis, James R.	Oklahoma City
Lewis, W. N.	Davis
Libby, N. D.	El Reno
Lienbach, Chester A.	McAlester
Lightfoot, W. P.	Enid
Lillard, Ross N.	Guthrie
Lilley, J.	Muskogee
Liming, Clement V.	Anadarko
Lincoln, Chas. P.	El Reno
Lincoln, J. H.	Henryetta
Lindblad, Walter E.	Eschite
Linebaugh, D. H.	Atoka
Linebaugh, F. N.	McAlester
Linebaugh, J. H.	Atoka
Linn, Will	Chickasha
Linney, Wm. B.	Pryor Creek
Linville, R. N.	Weatherford
Lipscomb, Thos. E.	Muskogee
Liscum, Fred I.	Pawnee
Little, J. C.	Ardmore
Littlejohn, W. N.	Sallisaw
Livesay, Randall U.	Anadarko
Livingston, John	Sayre
Lockridge, Ross F.	Shawnee
Lockwood, Cass T.	Blackwell
Lockwood, J. P.	Sulphur
Loden, H. H.	Durant
Logan, Oran J.	Mountain View
Long, James A.	Wetumka
Longfellow, Geo. N.	Okla. City
Loofbourrow, R. H.	Beaver
Lookabaugh, I. H.	Watonga
Loomis, P. H.	Wakita
Looney, M. A.	Tishomingo
Losey, Thos. B.	Atoka
Low, H. B.	El Reno
Lowary, A. J.	Watonga
Lowe, Jos. G.	El Reno

Lowe, Russell G.	Okla. City
Lowery, J. C.	Muskogee
Lowry, Chester H.	Stillwater
Lowry, Robert A.	Stillwater
Lucas, J. B.	Checotah
Lucas, W. M.	Tishomingo
Lukenbill, Wilber C.	Frederick
Lunsford, T. B.	Talihina
Lybrand, W. A.	Oklahoma City
Lydecker, John E.	Tulsa
Lydick, J. D.	Shawnee
Lyle, R. A.	Kingfisher
Lyons, Thos. D.	Tulsa
Lynch, Hugh L.	Oklahoma City
Lytle, L. O.	Guthrie

M.

McAdams, E. G.	Oklahoma City
McArthur, C. J.	Lindsay
McBrian, C. A.	Jefferson Co.
McCaleb, J. A.	Oklahoma City
McCalla, J. R.	Chickasha
McCann, James	Tulsa
McCann, Wm. L.	Okla. City
McClusky, W. S.	Tulsa
McCombs, Jason G.	Sallisaw
McComb, T. J.	Oklahoma City
McConnell, W. T.,	Oklahoma City
McCoole, Jno. I.	Francis
McConnell, Wm. T.	Okla. City
McCrory, Claud	Alva
McCulloch, Geo. E.	Vinita
McCurtain, D. C.	McAlester
McDaniel, David A.	Frederick
McDonald, A. A.	Hugo
McDonald, Alex.	Pawhuska
McDonald, C. S.	Pawhuska
McDonnell, Thomas P.	Newkirk
McDougal, D. A.	Sapulpa
McDowell, John G.	Bartlesville
McElhinney, Ray	Okmulgee
McElhoes, S. I.	Lawton
McFall, Wright L.	Tecumseh
McGill, Hugh W.	Ardmore
McGinnis, W. P.	Wilburton
McGraw, Henry	
McGuire, Frank H.	Guthrie
McGuire, H. P.	Frederick
McInnis, E. E.	Coalgate
McIntosh, Chesie	Checotah
McIntosh, Edward W.	Gotebo
McIntosh, J. T.	Durant
McInnis, Veris E.,	Oklahoma City
McKamy, J. L.	Sparks
McKeel, J. F.	Ada
McKelver, H. G.	Enid
McKelvy, J. G.	Pond Creek
McKennon, A. S.	McAlester
McKennon, T. H.	Guthrie
McKenzie, M. L.	Shawnee
McKenzie, M. W.	Shawnee
McKeown, Thomas D.	Ada
McKinley, R. W.	Guthrie
McKinney, B. A.	Durant
McKoin, C. G.	Muskogee
McLaughlin, J. E.	Sulphur
McLees, C. E.	Muskogee
McLendon, R. L.	Seminole
McLennon, W. M.	Dustin
McLoud, J. W.	Muskogee
McMahan, Argyle J.	Okla. City
McMaster, Frank	Lawton
McMechan, Tom F.	Okla. City
McMichael, Eugene C.	Tahlequah
McMillan, R.	Pauls Valley
McMillan, R. N.	Oklahoma City
McMullom, C. F.	Sapulpa
McMurray, J. F.	McAlester
McNabb, L. C.	Sallisaw
McNeal, W. H.	Ardmore
McNeil, N. E.	Pawnee
McPherren, C. E.	Caddo
McRea, A. S.	Muskogee
McRill, A. L.	Blaine Co.
McVay, Perry T.	Guthrie
McVean, Margaret	Okla. City
McVey, Grattan G.	Lehigh
McVickers, C. W.	Woodward
Maben, W. N.	Shawnee
MacDonald, D. S.	Bokchito
MacDonald, D. S.	Durant
Mackey, A. M.	Medford
Mackey, Paul F.	Vinita
Madalene, Jean	Pond Creek
Madaris, Wm. A.	Hobart
Madden, D. B.	Shawnee
Madison, Frank W.	Fairview
Magee, Carl C.	Tulsa
Magee, Percival	Tulsa

Magee, S. G.	Bartlesville
Malcomb, C. E.	Blaine Co.
Malloy, P. H.	Tulsa
Mann, Geo. L.	Creek Co.
Mann, Philip E.	Sapulpa
Manning, Curtis B.	Muskogee
Manning, Curtis B.	Muskogee
Manning, Edwin H.	Okla. City
Mansell, J. W.	Hobart
Marchant, E. B.	Clinton
Marcum, Thos.	Muskogee
Maris, L. A.	Ponca City
Marr, Chester A.	Guthrie
Marr, L. D.	Tulsa
Mars, Frank L.	Sapulpa
Mars, Jas.	Sapulpa
Marshall, C. H.	Silo
Marshall, Hanson L.	Eufaula
Marshall, J. W.	Duncan
Martin, Benjamin J.	Muskogee
Martin, R. C.	Idabel
Martin, Geo. W.	Gotebo
Martin, H. B.	Perry
Martin, Lewis T.	Bennington
Martin, L. J.	Tulsa
Martin, M. H.	Wagoner
Martin, Luther	Cherokee
Martindale, D. M.	Tulsa
Martindale, Merritt	Sayre
Marum, David P.	Woodward
Mason, I. R.	Ardmore
Mason, Benj. H.	Ada
Massingale, S. C.	Cordell
Mathers, Jas. H.	Ardmore
Mathews, Frank	Mangum
Mathews, W. M.	Okmulgee
Mathis, M. P.	Konawa
Matlack, Geo. A.,	Oklahoma City
Matson, D. C.	Ardmore
Maupin, J. A.	Perry
Maupin, R. W.	Perry
Maurer, W. A.	El Reno
Maxey, J. H.	Shawnee
Maxey, Leslie	Ada
Maxey, N. B.	Muskogee
Meachem, A.	Erick
Mechling, Geo. J.	Kay Co.
Meister, Melvin G.	Okla. City
Mellette, W. M.	Muskogee
Melton, Adrain	Chickasha
Melton, Alger	Chickasha
Melton, H. L.	Prague
Merrill, Wiley Booth	Elk City
Merriman, S. A.	Bokoshe
Merritt, Geo. E.	Pawnee
Merriweather, A. L. J.	Muskogee
Meyer, A. H.	Ardmore
Meyer, J. H.	Oklahoma City
Miles, Clarence O.	Quinton
Miller, Chas. W.	Weleetka
Miller, Freeman	Stillwater
Miller, Geo. Jr.	Oklahoma City
Miller, Henry J.	Chickasha
Miller, J. W.	Dustin
Miller, Loyal J.	Oklahoma City
Mills, Lawrence	Arapaho
Mills, Walter S.	Arapaho
Mills, Stephen A.	Atoka
Minter, J. O.	Madill
Mintonye, B. A.	Guthrie
Mitchell, Chas. T.	Stigler
Mitchell, E. L.	Cheyenne
Mitchell, J. D.	Pauls Valley
Mitchell, J. J.	Oklahoma Co.
Mitchell, Jos. D.	Pawhuska
Mitchell, L. D.	Oklahoma City
Mitchell, Noble	Sulphur
Mitchell, P. D.	Stillwater
Mitchell, W. B. M.	Pauls Valley
Mitchell, W. O.	Oklahoma City
Mitchell, Wm. C.,	Oklahoma City
Mitschrich, Chas.	Lawton
Mock, M. L.	Guthrie
Moffit, H. B.	Holdenville
Momyer, W. W.	Muskogee
Monett, Guy Sterling	Enid
Monk, Carl	Muskogee
Montgomery, F. L.	Muskogee
Montgomery, Geo. H.	Marietta
Montgomery, Finis	Okmulgee
Montgomery, Wm. H.	Okla. City
Montgomery, Henry H.	
Moody, W. E.	Claremore
Moon, Chas. A.	Muskogee
Moore, C. L.	Enid
Moore, Chas. G.	Purcell
Moore, D. G.	Texmo
Moore, Walter S.	Sallisaw
Moore, E. L.	Wagoner
Moore, Edwin Gray	Muskogee
Moore, E. H.	Okmulgee
Moore, Gray	Muskogee
Moore, J. B.	Ardmore
Moore, Jno. C.	Enid

Moore, Jno. B.	Muskogee
Moore, Jno. J.	Muskogee
Moore, J. Read	McAlester
Moore, P. G.	Checotah
Moore, Wm. L.	Hennessey
Moore, Wm. B.	Muskogee
Moore, U. C.	Lawton
Morgan, Barclay	Okmulgee
Morgan, D. H.	Muskogee
Morgan, Dick T.	Woodward
Morgan, H. W.	Anadarko
Morgan, Porter H.	Oklahoma City
Morley, R. F.	Tulsa
Morrill, P. K.	Altus
Morris, A. J.	Anadarko
Morris, C. A.	Hobart
Morris, E. E.	Duncan
Morris, J. A.	Lawton
Morris, J. W.	Tishomingo
Morris, Lon	Randlett
Morris, Perry J.	Shattuck
Morrison, D. C.	Muskogee
Morrison, Duncan L.	Guthrie
Morse, Joseph D.	Hobart
Morton, O. A.	Okfuskee
Morton, W. B.	Kiefer
Mosher, H. T.	Tulsa
Mosher, L. L.	Wagoner
Mosier, John H.	Norman
Mosier, L. P.	Frederick
Moss, A. F.	Oklahoma City
Moss, W. B.	Wagoner
Mossman, Benjamin	Muskogee
Moulton, F. L.	Muskogee
Mouser, W. H.	Cheyenne
Muldrow, H. L.	Tishomingo
Murchison, Kenneth S.	Tahlequah
Murphey, Geo. A.	Muskogee
Murphey, James J.	Kiefer
Murray, T. D.	Pauls Valley
Murray, Wm. H.	Tishomingo
Museller, A. R.	Alva
Myers, Chas. M.	Lawton

N.

Nagle, P. S.	Kingfisher
Nance, Richard Y.	Stilwell
Nash, T. D.	Alva
Neely, Geo. A.	Chandler
Neely, Sam	Bokoshe
Nelson, E. G.	Idabel
Nelson, Flowers	Tulsa
Nelson, Thomas O.	Hugo
Newell, Wm. M.	Norman
Newhouse, J. L.	Okmulgee
Newman, H. O.	Tishomingo
Nicholds, E. F.	Caddo
Nichols, Galen	Muskogee
Nicodemus, A.	Tulsa
Nicholson, Geo. M.	Sulphur
Niles, Claude A.	Checotah
Noah, Henry A.	Alva
Noffsinger, W. W.	Muskogee
Norman, J. F.	Oklahoma City
Norman, John L.	Okemah
Norman, Thos.	Ardmore
Norvell, Woodson	Tulsa
Nowlin, Claude	Oklahoma City
Nuckolls, Robert L.	Okemah
Nussbaum, Bert E.	Muskogee

O.

O'Bannon, S. L.	Okemah
O'Bryan, J. B.	Purcell
O'Bryan, T. L.	Woodward
O'Hare, S. V.	Muskogee
Oldfield, Edward D.	Okla. City
Olds, Harvey C.	Guthrie
O'Meara, J. P.	Bartlesville
O'Neil, Jno.	Holdenville
O'Reily, Ellis J.	Eufaula
Osborn, Monroe	Pauls Valley
Outcelt, Geo. A.	Shawnee
Overstreet, Jno. W.	Bristow
Owen, Thos. H.	Muskogee
Owen, Walter L.	Cherokee
Owens, M. D.	Chandler

P.

Pace, Jno. E.	Muskogee
Palmer, Jno. E.	Bartlesville
Palmer, Jno. F.	Pawhuska
Pancoast, Jno. L.	Kay Co.

Parker, C. H.	Enid
Parker, Chas. C.	Durant
Parker, Howard	Ada
Parks, Howell	Muskogee
Parks, J. D.	Idabel
Parks, S. F.	Vinita
Parmenter, B. M.	Lawton
Parshley, Stephen A.	Lawton
Parsons, Harry T.	Alva
Paschal, Geo.	Tahlequah
Patchett, Owen W.	Pauls Valley
Patridge, Geo. W.	Cherokee
Patterson, Adam E.	Muskogee
Patterson, J. B.	Weleetka
Patton, E. C.	Tishomingo
Patton, Harry L.	Miami
Patton, Howard N.	Woodward
Patton, J. A.	Woodward
Paul, G. A.	Oklahoma City
Paullin, Lewis	Durant
Payne, E. M.	Grady Co.
Payne, Victor	Watonga
Pearl, Geo. S.	El Reno
Peck, Cassius R.	Muskogee
Peck, Chas. D.	Clinton
Peck, H. M.	Oklahoma City
Peery, Cliff V.	Wilburton
Pendleton, W. S.	Shawnee
Penick, Giles A.	Muskogee
Pennel, Chas. W.	Bartlesville
Perkins, G. N.	Guthrie
Perkins, J. B.	Shawnee
Perkins, Mica John T.	Lawton
Perrett, W. K.	Arcadia
Perry, Edwin R.	Tulsa
Peters, Wm. S.	Boley
Peters, Nelson C.	Apache
Pettis, John A.	Oklahoma City
Pettit, Arthur	Coyle
Pfendler, Fred	Muskogee
Phelps, Edwin J.	Muskogee
Phelps, W. A.	Hobart
Phillips, Chas. A.	Durant
Phillips, Chas. L.	Okmulgee
Phillips, J. B.	Lawton
Phillips, James I.	El Reno
Phillips, Rufus P.	Arapaho
Phillips, Victor C.	Durant
Pickard, Jay E.	Guthrie
Pinkham, C. L.	Newkirk
Pitchford, John H.	Tahlequah
Pitman, Clyde G.	Tecumseh
Pitman, L. G.	Shawnee
Pleffer, Wm.	Ardmore
Plumlee, J. W. H.	Ryan
Poe, Lewis M.	Tulsa
Pollan, John R.	Poteau
Pomeroy, W. H.	Perry
Poole, W. L.	Durant
Pope, D. K.	Oklahoma City
Pope, Paul M.	Oklahoma City
Porter, Joseph	Bartlesville
Porter, Geo. M.	McAlester
Potter, Jno. G.	Okfuskee
Potter, R. T.	Okmulgee
Potter, W. D.	Ardmore
Potterf, H. C.	Ardmore
Pounders, L. K.	Wilburton
Powell, G. K.	Muskogee
Powell, Jas. L.	Muskogee
Powell, W. W.	Antlers
Powers, J. A.	Mangum
Pratt, Clifton J.	Oklahoma City
Priest, Samuel S.	Westville
Proctor, Jno. F.	Hugo
Proctor, W. A.	Marlow
Pruiett, Moman	Oklahoma City
Pryor, W. W.	Konawa
Ptak, Fred E.	Coyle
Purcell, Geo. W. M.	Marlow
Pursel, Carl	Muskogee
Putnam, I. M.	Oklahoma City
Putty, Geo. T.	Marlow
Pyeatt, Alvin F.	Pauls Valley
Pyle, Ulys	Stigler

R.

Rabitaille, Ernest A.	Tulsa
Ragland, Burwell A.	Ardmore
Raines, William H.	Guymon
Rainey, R. M.	Atoka
Rainey, W. H.	Atoka
Rains, Fred	Muskogee
Rakestraw, E. Vern	Gotebo
Ralls, J. G.	Atoka
Ralls, Geo. T.	Coalgate
Ramsey, Geo. S.	Muskogee
Ramsey, John R.	Tulsa
Rampendahl, W. F.	Muskogee

Randall, Harry	Taloga
Randolph, B. H.	Oklahoma City
Randolph, C. T.	Coalgate
Randolph, D. S.	Okeene
Randolph, H. W.	Tulsa
Ransdale, B. F.	Tulsa
Ransom, Walter L.	Perry
Rappolee, J. L.	Caddo
Rasmus, Wm. F.	Tahlequah
Ratliff, E. S.	Ada
Ratliff, J. S.	Tishomingo
Ray, J. Robert	Bartlesville
Ray, R. J.	Lawton
Raymond, Elam J.	Nowata
Ready, J. H.	Oklahoma City
Reasor, Edgar D.	Shawnee
Red, J. Earle	Holdenville
Redwine, W. H.	McAlester
Reeburgh, S. L.	Mangum
Reece, J. W.	Stillwater
Reed, Frank H.	Wewoka
Reeves, Wm. C.	Guthrie
Reeves, Raymond	Guthrie
Reeve, Theodore H.	Dewey
Reid, T. R.	El Reno
Reilly, F. H.	Shawnee
Remey, John A.	Guthrie
Rennie, Albert	Pauls Valley
Replogle, D.	Okemah
Reuter, Chas. T.	Tulsa
Reville, M. C.	Tahlequah
Reynolds, A. W.	Comanche
Rhea,, Evert P.	Porter
Rhea, Geo. P.	Porter
Rice, Benj. F.	Tulsa
Rice, C. T.	Purcell
Rice, F. E.	Lindsay
Rice, Dick	Miami
Richard, Jay E.	Guthrie
Richardson, Chas. E.	
Richardson, D. A.	Durant
Richardson, Dio	Lawton
Richardson, Geo. W.	Hugo
Richmond, Alexander	Muskogee
Riddle, F. E.	Chickasha
Riddle, John W.	Tulsa
Riddle, Seymour	Vinita
Rider, Geo. E.	Madill
Rider, O. L.	Vinita
Ridings, Sam P.	Pond Creek
Righter, F. B.	Broken Arrow
Riley, Chilion	Duncan
Rison, Albert W.	Madill
Ritchey, W. H.	Durant
Rittenhouse, Austin J.	Chandler
Rittenhouse, F. A.	Chandler
Rittenhouse, Geo. B.	Chandler
Rittenhouse, W. O.	Wagoner
Rives, Owen H.	Holdenville
Roach, L. J.	Muskogee
Roaten, John	Edmond
Robberts, J. C.	Enid
Roberson, J. L.	Newkirk
Roberson, S. T.	El Reno
Roberts, Ira M.	Sulphur
Roberts, R. J.	McAlester
Roberts, Leon F.	Pawhuska
Robertson, Geo. F.	Atoka
Robertson, J. B. A.	Chandler
Robertson, Jno. W.	Checotah
Robertson, W. G.	Muskogee
Robinson, Ellis A.	Tulsa
Robinson, Frank L.	Wynnewood
Robinson, L. B.	Perry
Robinson, Willis O.	Okla. City
Rockwood, C. B.	Bristow
Roddie, Reuben M.	Ada
Rogers, Harry H.	Wewoka
Rogers, Geo. Dick	Muskogee
Rogers, John D.	Altus
Rogers, Robert	Pauls Valley
Rogers, Wm. T.	Kiowa
Rogers, W. H.	Pond Creek
Rogers, W. H.	Sallisaw
Roland, Robert C.	Ada
Root, W. P.	Sapulpa
Rose, D. S.	Blackwell
Roseman, C. D.	Enid
Rosenwinkel, G.	McAlester
Ross, Leslie P.	Lawton
Rosser, Malcolm E.	Poteau
Roth, Sidney R.	Canton
Rubelt, H. B.	Checotah
Rucker, J. B.	Tulsa
Rummons, N.	Hobart
Runyan, C. F.	Muskogee
Rush, Geo. P.	Enid
Rushing, Frank W.	Eufaula
Russell, Stillwell H.	Ardmore
Ruth, Chas. H.	Oklahoma City
Rutherford, S. M.	Muskogee
Ryan, Xavier	Oklahoma City
Rye, Wm. T.	Vinita

S.

Saddler, E. I.	Guthrie
Saltzgaber, G. V. H.	Lawton
Sanders, Bruce	Oklahoma City
Sanders, H. N.	Duncan
Spencer E. Sanders	Muskogee
Sandlin, J. M.	Guthrie
Sanson, Thos. A.	Muskogee
Saunders, M. A.	Shawnee
Schaeffer, Arthur B.	Tulsa
Schaeffer, Horace B.	Tulsa
Schermerhorn, Alex. V.	Muskogee
Schlegel, E.	Durant
Schuermeyer, W. F.	Muskogee
Schwanson, Henry	Chant
Schwartz, J. W.	Tulsa
Schofield, J. G.	Checotah
Scothorn, J. W.	Guthrie
Scott, A. L.	Ryan
Scott, E. F.	Pawhuska
Scott, Joel R.	Perry
Scott, Winfield	Enid
Seaton, Harry	Pryor Creek
Seaver, W. F.	Muskogee
Seay, A. J.	Kingfisher
Seely, Silas E.	
Selby, Chas. B.	Sterling
Self, J. W.	Wagoner
Semple, Wm. F.	Caddo
Senders, Spencer E.	Muskogee
Severson, John S.	Tulsa
Sewell, A. C.	Crowder
Shackleford, T. F.	Sallisaw
Sharp, E. E.	
Sharp, E. F.	Chickasha
Sharp, J. F.	Purcell
Sharp, M. F.	Muskogee
Sharp, Newton E.	Norman
Shartell, John W.	Oklahoma City
Shea, John J.	Bartlesville
Sheldon, S. A.	Shawnee
Shepard, Chas. J.	Pawnee
Shepherd, R. W.	Sulphur
Sherman, Roger S.	Tulsa
Shinn, Preston A.	Pawhuska
Shipman, J. T.	Bartlesville
Shive, Richard	Arapaho
Shockley, M. E.	North Enid
Shumate, G. O.	Clinton
Sidell, William T.	Bartlesville
Sigler, Fred E.	Oklahoma City
Simms, W. M.	Vinita
Simon, Chas. N.	Erick
Simons, P. C.	Enid
Simpson, E. J.	El Reno
Simpson, Oscar	Hobart
Sims, H. T.	Ardmore
Singleton, M. S.	Oklahoma City
Sisson, N. E.	Anadarko
Sitton, Henry W.	Comanche
Skinner, J. L.	Wetumka
Slough, E. D.	Madill
Sleeper, D. L.	Tulsa
Smith, A. P.	Weleetka
Smith, E. F.	Enid
Smith, Herbert C.	Tahlequah
Smith, F. H.	Muskogee
Smith, Benj. B.	Woodward
Smith, C. C.	Guthrie
Smith, Wilson N.	Grove
Smith, D. M.	Duncan
Smith, Don Carlos	El Reno
Smith, E. F.	Oklahoma City
Smith, Edgar	Muskogee
Smith, Frank P.	Sapulpa
Smith, H. A.	Lawton
Smith, Harry W.	Oklahoma City
Smith, Herbert	Okmulgee
Smith, Horace A.	Noble Co.
Smith, H. H.	Shawnee
Smith, H. O.	Perry
Smith, Howard F.	Vinita
Smith, J. Harris	Sapulpa
Smith, J. Wesley	Spiro
Smith, Joseph P.	Purcell
Smith, Maurice	Chickasha
Smith, O. O.	Woodward
Smith, Orville T.	Guthrie
Smith, Samuel	Stillwater
Smith, P. Y.	Vinita
Smith, Sherman M.	Woodward
Smith, W. A.	Oklahoma City
Smith, Wilford M.	Lawton
Sneed, Earl E.	Tulsa
Sniggs, Victor A.,	Oklahoma City
Snoddy, W. W. S.	Alva
Snodgrass, F. A.	Arapaho
Snodgrass, Mrs. Fred	Arapaho
Snyder, Warren K.,	Oklahoma City
Sompayrac, Powell A.	Bartlesville
Soper, P. L.	Muskogee

Sornberger, S. H.	Sapulpa
Soward, Tom H.	Guthrie
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Springfield, W. H.	Shattuck
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Squire, A. L.	Grand
Stacey, William	Chickasha
Standard, E. C.	Shawnee
Standeven, H. L.	Hobart
Stanford, H. E. P.	Okmulgee
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Stanley, John M.	Pauls Valley
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Starr, John C.	Vinita
Starr, Oliver	Tulsa
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Steen, James W.	Enid
Steel, C. C.	Tulsa
Steel, Robert E.	Idabel
Stephens, Chas. S.	Tishomingo
Stephens, Ransom	Chickasha
Stephenson, C. W.	Grant Co.
Stephenson, N. O.	Hooker
Stevens, A. J.	
Stevens, Walter C.	Lawton
Stewart, Anderson	Muskogee
Stewart, Calvin	Muskogee
Stewart, Andrew M.	Mangum
Stewart, E. M.	Lookey
Stewart, Robert	Pawhuska
Stewart, R. Emmett	Muskogee
Stewart, W. M.	Caddo Co.
Stewart, W. P.	Antlers
Stobaugh, John J.	Tishomingo
Stolper, J. H.	Krebs
Stone, Duke	Ada
Stone, J. C.	Okmulgee
Stovall, D. A.	Hugo
Stradler, Walter P.	Bartlesville
Strange, I. L.	Hugo
Stratford, A. A.	Ponca City
Strifler, Ben L.	Wakita
Stringer, C. W.	Oklahoma City
Stuart, C. B.	McAlester
Stubblefield, H. C.	Lawton
Stuckey, W. L.	Muskogee
Stull, Arthur A.	Enid
Sturgis, H. J.	Enid
Sullivan, P. M.	Oklahoma City
Sullivan, Sam K.	Newkirk
Sullivan, W. J.	Muskogee
Sutherland, G. K.	Hominy
Sutherlin, J. H.	Wagoner
Sutton, A. G.	Alva
Sutton, Walter S.	Enid
Swain, Orlando	Okmulgee
Swank, F. B.	Norman
Swigert, E. L.	Enid
Swindall, Charles	Woodward
Swisher, Geo. E.	

T.

Talley, Haskell B.	Tulsa
Tarpenning, O. C.	Oklahoma City
Tate, H. M.	Wewoka
Taylor, Isaac D.	Guthrie
Taylor, Jno. M.	Claremore
Taylor, L. K.	Chickasha
Taylor, Wm. M.	Tecumseh
Taylor, Sam R.	Muskogee
Taylor, Yerker E.	Pauls Valley
Tebbe, E. F.	Perry
Tehee, Houston B.	Tahlequah
Temple, F. W.	Idabel
Tener, H. O.	Taloga
Terral, J. E.	Hobart
Terrell, Joel	Ada
Tetirick, W. C.	Blackwell
Thacker, Chas. M.	Mangum
Thacker, H. Milton	Mangum
Thigpen, J. H.	Wagoner
Thigpen, Joseph	Wagoner

Thomas, T. H.,	Pottawatomie Co.
Thomas, C. L.	Muskogee
Thomas, J. Elmer	Lawton
Thomas, John R.	Muskogee
Thomas, R. W.	Geary
Thompson, Chas. H.,	Pauls Valley
Thompson, Lee D.	Newkirk
Thompson, H. C.	Seminole
Thompson, J. C.	Ardmore
Thompson, Joe B.	Pauls Valley
Thompson, M. A.	Muskogee
Thompson, Rufus B.	Sapulpa
Thompson, W. B.	Shattuck
Thompson, W. P.	Vinita
Thompson, Z. J.	Weleetka
Thompson, T. J.	Oklahoma City
Thorp, C. M.	Oklahoma City
Thorp, D. M.	Oklahoma City
Thraves, W. V.	Nowata
Threadgill, C. M.	Coalgate
Thrift, J. E.	Sapulpa
Thrift, R. J.	Checotah
Thurman, P. L.	Tulsa
Thurman, Harold Clark	Muskogee
Tibbetts, D. M.	Guthrie
Tichenor, Oscar L.	Cherokee
Tichnor, H. M.,	Pottawatomie Co.
Tillory, A. Duff	Guthrie
Tillotson, J. A.	Nowata
Tipsward, Miles A.	Enid
Tisdel, Clark J.	Muskogee
Tisinger, B. L.	Mangum
Titus, A. J.	Cherokee
Todd, Jesse J.	Sentinel
Todd, Jarrett	Greer Co.
Tolbert, Jas. R.	Hobart
Tomorlin, Jno. C.,	Oklahoma City
Toney, Thomas E.	Holdenville
Toney, Wm. M.	Weleetka
Toomer, Robt.	Muskogee
Tracy, D. W.	Elk City
Tracy, Fred C.	Beaver
Travers, O. H.	Lawton
Treadwell, S. C.	Tishomingo
Trimble, J. Frank	Sayre
Trips, T. S.	Shawnee
Trosper, R. E.	Lawton
Truett, Carl F.	Frederick
Trusler, Harry Raymond	Enid
Tscharner, Frank P.	Muskogee
Tucker, Wm. F.	Tulsa
Tully, C. H.	Eufaula
Turman, Wm. S.	Okmulgee
Turner, A. W.	Altus
Turner, John B.	Guthrie
Turner, K. B.	McIntosh Co.
Turner, Jno. E.	Hughes Co.
Turner, Martin E.,	Oklahoma City
Turner, T. L.	Arapaho
Twine, W. H.	Muskogee
Twyford, James S.	Oklahoma City
Tyler, Albert H.	Watonga
Tyler, E. O.	Kingfisher
Tyrel, W. F.	Durant

U.

Uhl, George P.	Stillwater
Utterback, W. E.	Durant

V.

Vandeventer, A. F.	Bartlesville
Van Dyke, B. F.	Granite
Van Hoy, W. C.	Bartlesville
Van Leuven, Bert	Nowata
Vann, W. H.	Linopah
Van Winkle, John M.	Shawnee
Varner, T. T.	Poteau
Varnum, W. L.	Sapulpa
Vaught, Ed. S.	Oklahoma City
Vaughn, I. J.	Durant
Veasey, James A.	Bartlesville
Venable, John H.	Chickasha
Verne, Chas.	Seminole
Verna, Euloe V.	Muskogee
Vertrees, John L.	Lawton
Vickrage, Richard P.	Okmulgee
Vigg, Sandor J.	Alva

W.

Wadlington, A. W.	Purcell
Wadlington, B. C.	Purcell
Waggoner, G. T.	Wagoner
Waggoner, Grant	Tulsa

Wagoner, F. A.	Chandler
Wagner, G. E.	Cordell
Wakely, John D.	Tulsa
Walker, C. S.	Tulsa
Walker, D. M.	Enid
Walker, E. A.	Ardmore
Walker, H. T.	Muskogee
Walker, Lafayette	Holdenville
Walker, S. E.	Fairview
Walker, Thos. W.	Broken Arrow
Walker, W. H.	Tishomingo
Walkinstick, S. R.	Tahlequah
Wallace, A. C.	Miami
Wallace, Lewis	Guthrie
Wallace, W. M.	El Reno
Walling, Frank G.	Pond Creek
Walrond, Z. T.	Muskogee
Ward, W. T.	Ardmore
Walton, W. D.	Hobart
Warren, Frank L.	Holdenville
Warren, Walter T.	Guthrie
Warter, J. M.	Pawhuska
Watkins, Chas. D.,	Oklahoma City
Watkins, John	Muskogee
Watts, Jesse W.	Sallisaw
Watts, Chas. G.	Wagoner
Watts, Thos. J.	Muldrow
Weathers, Robt. E.	Frederick
Weaver, Claude	Oklahoma City
Webb, Wm. P.	Frederick
Webb, James E.	Ada
Webb, K. W.	Oklahoma City
Webster, Geo. T.	Weatherford
Weeks, C. B.	Atoka
Weeks, R. A.	Atoka
Welborne, R. D.	Chickasha
Welbourn, Albert	Chickasha
Welch, A. J.	Clinton
Welch, C. A.	Talihina
Welch, Edward G.	Woodward
Welch, Geo. W.	Tonkawa
Welch, H. L.	Addington
Welch, R. P.	Calvin
Wells, Chas. R.	Shawnee
Wells, C. C.	Mangum
Wells, Frank	Oklahoma City
Wells, R. H.	Lehigh
Wells, W. E.	Chandler
Welty, D. B.	Oklahoma City
West, A. T.	Lehigh
West, Chas. J.	Guthrie
West, Howard	Ada
West, Preston C.	Muskogee
Weston, Samuel	Stillwater
Whalin, H. N.	Lawton
Wheatley, G. W.	Muskogee
Wheeler, Benj. B.	Muskogee
Wheeler, J. T.	Wynnewood
Wheeler, Robert	Tecumseb
Wheeler, S. J.	Kingston
Whirlow, W. S.	Kingfisher
Whistler, Franklin	Kingfisher
Whitaker, Chas. F.	Guymon
Whitaker, Chas.	Eufaula
Whitaker, Walter	Guymon
White, Chas. W.	Woodward
White, C. P.	Lawton
White, T. T.	Sulphur
White, Hiram	Pawhuska
White, Harry	Oklahoma City
White, Lyman	Hugo
White, Myron	Muskogee
White, James M.	Quinton
White, R. P.	Poteau
Whiteside, A. N.	Perry
Whiting, V. W.	Enid
Whitley, Thomas C.	Guthrie
Whitley, W. W.	Boswell
Whitney, E. W.	Wewoka
Whittinghill, W. S.	Enid
Whittington, Chas. W.	Lawton
Widdows, A. M.	Chandler
Wieck, Bernard C.	Ponca City
Wiggins, S. T.	Wagoner
Wilcox, Gaylord	Antlers
Wilcox, Wm. H.	Ripley
Wildman, R. T.	Bartlesville
Wiley, M. G.	Guymon
Wilhoit, J. C.	Wewoka
Wilkin, Karl Z.	Enid
Wilkins, J. H.	McAlester
Wilkins, T. B.	Durant
Wilkinson, James P.	Shawnee
Wilkinson, H. A.,	Oklahoma City
Wilkinson, J. B.	Comanche
Wilkinson, Wallace	McAlester
Williams, Alfred E.	Grand
Williams, B. F. Sr.	Norman
Williams, Frank	Shawnee
Williams, James T.	Shawnee
Williams, Herbert W.	Sapulpa
Williams, Jesse	Shawnee
Williams, John E.	Manitou
Williams, J. M.	Olustee

Williams, Lewis A.	Muskogee
Williams, M. L.	Muskogee
Williams, Benj. F. Jr.	Norman
Williams, Paul	Guthrie
Williams, R. L.	Durant
Williams, H. B.	Tulsa
Williams, W. T.	Shawnee
Williams, J. D.	Shawnee
Willis, J. M.	Hugo
Willmot, John W.	Wewoka
Wilson, Chas.	Muskogee
Wilson, C. B.	Enid
Wilson, C. B. Jr.	Enid
Wilson, D. H.	Vinita
Wilson, E. G.	Catoosa
Wilson, L. T.	Alva
Wilson, Lee F.	Oklahoma City
Wilson, Louis S.	Pawnee
Wilson, W. S.	Oklahoma City
Wimbish, Robert	Ada
Wineland, Herbert L.	Boynton
Winfrey, W. F.	Ardmore
Winn, Wm. H.	Oklahoma City
Winn, H. R.	Oklahoma City
Winn, U. G.	Ada
Winsor, Harry	Stillwater
Wisby, Joseph	Guthrie
Wise, T. R.	Sayre
Wishard, W. S.	Watonga
Witten, W. W.	Okmulgee
Wolf, Benj. F.	Norman
Wolfe, R. M.	Cherokee
Wolfe, Nick	Tishomingo
Wolfenberger, W. S.	Muskogee
Wolverton, H. M.	Duncan
Wolverton, Jas. H.	Lawton
Womach, G. T.	Duncan
Womack, T. J.	Alva
Wood, A. G.	Thomas
Wood, J. H.	Shawnee
Wood, Jas. R.	Coalgate
Wood, H. P.	Sapulpa
Wood, J. P.	Wapanucka
Wood, Robt. E.	Shawnee
Wood, Samuel G.	Oklahoma City
Wood, Bert G.	Muskogee
Wood, W. W.	Okmulgee
Woodford, J. W.	Tulsa
Woods, Chas. H.	Guthrie
Woods, W. H.	Purcell
Woodward, Arthur T.	Pawhuska
Woodward, F. B.	Dewey
Workman, J. S.	Payne Co.
Woolman, W. O.	Watonga
Works, A. M. Jr.	Hugo
Worten, J. Marx	Pawhuska
Wortman, C. S.	Claremore
Wren, T. H.	Okemah
Wright, Allen	McAlester
Wright, J. C.	Okemah
Wright, Norman A.	Okla. City
Wright, John H.	Oklahoma City
Wright, Thomas L.	Ardmore
Wrightsman, C. J.	Tulsa
Wyand, C. H.	Woodward
Wyand, J. E.	Muskogee
Wybrant, O. C.	Woodward
Wylie, Robin W.	Hennessey

Y.

Yancey, D. W.	Muskogee
Yantis, N. P.	Woodward
Young, B. O.	Oklahoma City
Young, John M.	Lawton
Young, John T.	Tishomingo

Z.

Zevely, J. W.	Muskogee
Zimmerman, Geo. F.	Okla. City
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1. **Instruction—Question for Jury.** Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under Mansf. Dig. sec. 2259 (Ind. T. Ann. St. 1899, sec. 1602), a conviction cannot be had on the testimony of an accomplice unless corroborated was sufficient, and it was not error not to further charge that a certain witness was an accomplice. If defendant regards the word "accomplice" as a technical one requiring a definition by the court, he should so request, but not ask an instruction that a certain witness is an accomplice; that being a question for the jury. **Driggers v. U. S.** 167

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AMENDMENT—See "Indictment and Information," 1.

APPEAL AND ERROR—See "Habeas Corpus," 16.

Special review of convictions requiring death penalty—See "Courts."

1. **Review of Evidence, when Unnecessary.** When an assignment of error, that the evidence does not support the verdict, is overruled, and the cause remanded upon errors of law, the court will not discuss the evidence. **Slater v. U. S.** 275

2. **Record—Preservation.** Where the record shows no objection was made and no exceptions taken, the error will not be considered by the court except in the interest of justice. **George v. U. S.** 307

APPEAL AND ERROR—Continued.

3. **Review—Objections — Evidence — Presentation.** When a defendant seeks a new trial upon the ground that the trial court erred in the admission of evidence against him, his counsel should, in their presentation of this ground for a new trial to this court, point out the alleged improper evidence objected to, and also give the names of the witnesses, and so directly call the attention of this court to the ground of the objection that the error, if any, can be passed on intelligently; otherwise this court would not know what particular objection counsel was relying upon. **Johnson v. State** 321

4. **Review—Instructions—Errors must be Specified.** In support of a motion for a new trial, upon the ground that the court erred in refusing to give the instructions requested by the defendant, or in misdirecting the jury as to the law of the case, counsel for defendant should, in their presentation of this ground, point out the specific errors complained of. **Johnson v. State** 321

5. **Objections to Evidence—Definiteness.** Objections to the admissibility of evidence must at least be as definite as is required by Act 1905 (Laws 1905, p. 327, c. 27, art. 7, sec. 2), or they will not be considered by this court. **Price v. State** 358

6. **Review—Record of Excluded Evidence.** Where an objection to a question is sustained, and it is desired to preserve the matter for review in this court, the facts expected to be proven by the witness, in answer to the question excluded, should be incorporated in the record, so that this court can determine as to whether material and legal evidence has been excluded. **Price v. State** 358

7. **Review—New Trial—Grounds—Sufficiency of Evidence..** A new trial will not be granted for insufficiency of the evidence, or where the evidence is conflicting, or because the verdict is contrary to the evidence; these questions being within the discretion of the trial court, its decision will not be disturbed on appeal, unless it appears that the trial court abused its discretion touching these matters. **Hinsley v. U. S.** 392

8. **Review of Evidence.** Upon the overrling of a motion for a new trial by the trial court upon the ground that there is no evidence to support the verdict, when the overruling of such motion was properly excepted to and preserved in the record, and is made the basis of an assignment of error, it is the duty of the appellate court to review the evidence; and, if the record discloses that there is no evidence to support the verdict, a new trial should be granted. **Hinsley v. U. S.** 392

APPEAL AND ERROR—Continued.

9. **Reversal and Dismissal.** When an indictment is fatally defective, and there is no testimony in the case tending to show a violation of law, the conviction will be reversed, with directions to dismiss the case. **Weston v. Territory**.. 407

10. **Misconduct of Counsel—Review.** Where the language used by the Assistant United States Attorney in his opening statement is calculated to prejudice the accused, and proper objection is made and overruled by the court, and exception taken, the question will be reviewed by this court, but not otherwise. **Vickers v. U. S.** 452

11. **Instructions—Waiver of Objections.** In a criminal case (other than a capital case), in the absence of any request by the accused for specific instruction, it will be held that the accused was satisfied with the instructions as given. **Price v. Territory** 508

12. **Same.** When the accused complains that the trial court erroneously instructed the jury, but such instructions were not excepted to by him at the time and the exceptions properly saved in the record, such error, unless of a fundamental character, will be treated as waived by the accused, and exceptions to such instructions will not be considered for the first time in this court. **Idem** 508

13. **Review—Rulings on Evidence.** In all cases except capital offenses, this court will not review the action of the trial court in admitting or rejecting evidence over the objection and exception of the accused, unless such objection and exception appear of record in the proceedings of the trial court. **Idem** 508

14. **Sufficiency of Evidence.** To test the legality of a verdict in a case of larceny, where the jury has convicted a defendant upon the testimony of an accomplice, with independent evidence tending to connect the defendant with the commission of the offense, this court will take the strongest view of the corroborating evidence against the defendant that the evidence would warrant the jury in arriving at. **Alderman v. Territory** 562

15. **Same—Accomplice Testimony.** Where a defendant is convicted on accomplice testimony, and the evidence is clear and direct, this court will not reverse the judgment of the lower court, unless it is able to say that the record does not contain any evidence, independent of the testimony of the accomplice, which tends to connect the defendant with the commission of the offense. **Idem** 562

16. **Estoppel to Allege Error—Invited Error.** The accused will not be heard to complain that evidence offered in support of a dying declaration was heard by the court in the absence of the jury, when such absence was requested by the accused. **Bilton v. Territory** 566

APPEAL AND ERROR—Continued.

17 **Presentation and Reservation of Grounds of Review—Objections—Argument of Counsel.** When the prosecuting attorney goes outside of the record and makes improper remarks, calculated to prejudice the rights of the accused, it is the duty of counsel of the accused to promptly interpose an objection to such remarks, and move the court to withdraw them from the consideration of the jury and instruct the jury not to consider such remarks. In this case, if this court believes that the remarks of the county attorney complained of materially aided in bringing about the verdict, we will set the verdict aside on account of such remarks. **Bilton v. Territory** 566

18. **Review—Assignment of Error.** When counsel fail in their briefs to point wherein the defendant has been injured by an instruction given, this court will not consider an assignment of error based upon such ground, unless the error is fundamental. **Douglas v. Territory** 583

19. **Reversal.** When the record shows that a conviction has been fairly obtained, this court will not consider technical errors which do not affect the substantial rights of the defendant. But we will not allow any judgment of conviction to stand when the record shows that unfair means were resorted to in order to obtain it. **Harjo v. U. S.** 590

20. **Saving of Exceptions.** An exception must be saved to alleged errors of the trial judge in the admission or exclusion of evidence, or they will not be reviewed upon appeal. **Morris v. Territory** 617

21. **Rehearing—Grounds.** A motion for rehearing will not be granted where substantial justice has been done in the original decision, even though all of the reasoning in such opinion is not approved of. **Roper v. U. S.** 712

22. **Harmless Error—Substantial Justice.** When a defendant is clearly proven to be guilty, this court will not reverse a conviction upon any technicality or exception which does not affect the substantial rights of the defendant. **George v. U. S.** 307

23. **Harmless Error—Technicalities.** The laws of Oklahoma are to be liberally construed in the furtherance of justice, and a conviction will not be reversed upon a technicality which does not affect the substantial rights of the defendant. **Buck v. Territory** 517

24. **Review—Harmless Error.** (a) By statute the common-law rule of strict construction of penal laws has been repealed, and this court is required to construe all laws liberally and in furtherance of justice; and we are

APPEAL AND ERROR—Continued.

expressly forbidden to render judgment upon any technicality or exception which does affect a substantial right of a defendant.

(b) For statement of testimony, in view of which the trial judge did not commit reversible error in failing to instruct the jury upon the question of character, see opinion. **Morris v. Territory** 617

25. **Harmless Error—Fair Trial.** This court will not reverse the judgment of the trial court, where the record before it shows that the accused had a fair trial, by a fair and impartial jury and trial judge, simply because harmless error may have occurred at the trial. **Byers v. Territory**.. 677

26. **Same.** The admission of incompetent evidence before a jury is not ground for reversal unless it affirmatively appears from the entire testimony in the case that such improper evidence was calculated to influence the jury against the defendant in arriving at a verdict. **Idem** 677

27. **Same.** This court will not reverse a conviction on account of the admission or rejection of evidence unless both error and injury therefrom appears in the record. **Idem,** 677

ARGUMENT OF COUNSEL—Improper remarks—See "Conduct of Counsel"; "New Trial,," 2, 3.

ASSAULT—Necessity of instruction upon evidence of independent assault—See "Evidence," 3.

BAIL—Mandamus to record former order—See "Mandamus," 3.

1. **Application for—Burden of Proof on Applicant.** Upon an application to the Supreme Court for bail, by writ of **habeas corpus,** after commitment for a capital offense by a justice of the peace, the burden is upon the petitioner to show that he is illegally deprived of his liberty. **In re Thomas** 15

2. **Reasonable Doubt.** If, after hearing the whole evidence, introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused. **Idem** 15

3. **Conflict in Evidence—Force to be Given.** It is not all conflicting exculpatory evidence that will have the effect to raise a reasonable doubt of guilt, and destroy or impair the force of "evident proof" made by inculpatory evidence. It is for the judge or court who hears the testimony to consider the evidence as a whole, and if by the entire evidence a reasonable doubt of the applicant's guilt of a capital offense is not generated the proof is evident and bail should be denied. **Idem** 15

BAIL—Continued.

4. **Habeas Corpus—Presumption of Guilt.** For the purpose of an application to reduce bail after information filed, the court must assume that defendant is guilty of the offenses charged. **Ex parte McClellan** 299

5. **Reduction of Bail.** The Criminal Court of Appeals will not grant a reduction of bail on **habeas corpus,** unless it clearly appears that the amount fixed by the trial court is excessive and clearly disproportionate to the offense involved. **Idem** 299

6. **Amount—Purpose.** In fixing the amount of bail, the sole purpose which should guide the court or judge should be to cause the appearance of the accused to answer the charge against him. **Ex parte Houghton** 303

7. **Presumption of Guilt.** For the purpose of an application to reduce bail, after information filed the court must assume that defendant is guilty of the offense charged. **Idem** 303

8. **Excessive Bail—Reduction.** The Criminal Court of Appeals will not grant reduction of bail on **habeas corpus,** unless it clearly appears that the amount fixed by the trial court is excessive and clearly disproportionate to the offense involved. **Idem** 303

9. **Same—Case.** Where five informations were filed against petitioner, each charging him with illegal sale of intoxicating liquor, an order admitting petitioner to bail in the sum of $500 on each charge was not excessive; but an order fixing bail in the sum of $1,000 each, on three subsequent charges for the same offense, is excessive. When the trial court fixed the bail upon each of the first five charges at $500, it necessarily determined that such sum was sufficient to secure the attendance of petitioner to answer the subsequent charges. **Idem** 303

10. **Capital Offense—Illness.** On application to the Criminal Court of Appeals for bail by writ of **habeas corpus** after commitment for a capital offense by a justice of the peace, when it is made clearly to appear, by the testimony of competent, reputable physicians who have examined the physical condition of the prisoner at the time the application is made, that there is strong ground for the opinion that continued confinement would cause the disease from which the prisoner is then suffering to terminate fatally, he should be released on bail. **Ex parte Watson** 595

BILL OF RIGHTS—See "Weapons."

BURDEN OF PROOF—See "Bail"; "Evidence."
Former adjudication—See "Judgment," 1.

BURDEN OF PROOF—Continued.

Impeaching regularity of court proceedings—See "Trial," 3.
Change of venue—See "Venue."

CAPITAL PUNISHMENT—See "Punishment."

CARRYING OF WEAPONS—See "Weapons."

CERTIFIED QUESTIONS—From Criminal Court of Appeals to Supreme Court—See "Intoxicating Liquors," 4-10.

CHALLENGE—See "Grand Jury"; "Jury."

CHANGE OF JUDGE—See "Judges."

CHANGE OF VENUE—See "Venue."

CHARGE OF COURT—See "Instructions."

CHASTITY, IMPUTING WANT OF—See "Indictemnt and Information," 1.

CIRCUMSTANTIAL EVIDENCE—Necessity of instruction—See "Instructions," 2.

CITIES—See "Municipal Corporations."

COMMITMENT—See "Sentence and Commitment."

CONDUCT OF COUNSEL—See "Appeal and Error," 10; "New Trial," 2, 3.

1. **Arguments—Objection.** (a) When the prosecuting attorney goes out of the record and makes improper remarks, calculated to prejudice the rights of the defendant, it is the duty of counsel for the defense to promptly interpose an objection to such remarks, and move the court to withdraw them from the consideration of the jury, and to instruct the jury not to consider such remarks.

(b) It is too late to interpose objections to improper remarks of the prosecuting attorney in his argument to the jury, after the argument has closed, unless the remarks were of such a character that their withdrawal from the consideration of the jury would not cure the error committed in their utterance.

(c) If counsel for the defense go out of the record and make remarks not authorized by the evidence, they cannot be heard to complain if counsel for the prosecution are permitted to go outside the record in replying to such statements.

(d) When it is claimed that counsel for the prosecution went out of the record, and made improper remarks, calculated to prejudice the defendant, and the trial judge certifies in the record that such remarks were made in reply to remarks not authorized by the evidence made by counsel for the defense, such certificate is permissible;

CONDUCT OF COUNSEL—Continued.

and, in the absence of any showing in the record to the contrary, the appellate court is bound by such certificate of the trial judge. **Buck v. Territory** 517

2. **Improper Argument.** The trial court ought to confine counsel strictly within the facts of the case, and, if counsel persistently go outside of the record in their argument or statements to the jury, then the court should punish them; and, if they should obtain their verdict by this means, then the court should set such verdict aside. **Bilton v. Territory** 566

3. **Improper Questions.** The defendant, in a murder case on appeal, cannot predicate error on misconduct of the prosecuting attorney in asking improper questions, where the court sustained the objections as made, and where no request was made to the court to instruct the jury not to consider the same. **Cannon v. Territory** 600

CONDUCT OF COURT—Intimation of opinion—See "Trial," 1.

CONSENT—See "Larceny," 2.

CONSPIRACY—Declarations of conspirators—See "Evidence," 9.

Evidence—Acts and Statements Prior to Formation. Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the others for the commission of the crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and where the acts or statements of one of the defendants, prior to the formation of the conspiracy, are inadmissible as evidence against others. **Driggers v. United States** 167

CONSTITUTIONAL LAW—See "Criminal Law"; "Indictment and Information," 13; "Intoxicating Liquors"; "Weapons."

1. **Initiative and Referendum.** The initiative and referendum provisions in the Constitution (article 5, sections 1, 2, 3, 4, 5, and article 18, sections 4, 5) are not in conflict with the Constitution of the United States (section 4, art. 4), guaranteeing to every state a republican form of government. **Ex parte Wagner** 148

2. **Same—Non-self-executing.** Said provisions as contained therein are not self-executing, but are made effective by an act of the Legislature approved April 16, 1908. **Idem..** 148

3. **Same—Ordinances—Premature Petition for Referendum.** Until said provisions were made effective by legislation, a petition for a referendum of an ordinance filed with the

CONSTITUTIONAL LAW—Continued.

chief executive officer of a municipality of the first class was of no effect. **Idem** 148

4. **Same—Violation of Ordinance—Petition for Referendum.** An ordinance having been passed and published, and thereafter a petition for referendum filed with the mayor of Kingfisher, and afterwards said relator being convicted in said municipal court for an alleged violation after the filing of said petition, he is not entitled to be discharged from said conviction. **Idem** 148

5. **Office of Schedule.** A schedule to a Constitution generally contains temporary provisions for the preparatory machinery necessary to put the principles of the government under the Constitution in motion without disorder or collision, not as a rule to control the principles of the organic law, or to limit the same, but to carry the whole into effect without break or interval. **Arie v. State** 250

6. **Self-Executing Provisions—Prosecution of Felony by Information.** Section 17, art. 2 (Bill of Rights), of the Constitution of Oklahoma (Bunn's Ed. sec. 26), which provides that: "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be porsecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination"—is effective, and, as supplemented by the provisions of the common law in force in this jurisdiction (Wilson's Rev. & Ann. St. 1903, c. 66, art. 1, sec. 4200), and chapter 68, art. 5 (Cr. Proc.) Wilson's Rev. & Ann. St. 1903, sections 5216-5303, supplies a sufficient rule by means of which the right given under said section may be exercised or enforced. **Ex parte McNaught** 260

7. **Same—Repeal of Repugnant Statute.** Bill of Rights, Const. art. 2, sec. 17 (Bunn's Ed. sec. 26), relating to prosecutions for felony by indictment or information, repealed Wilson's Rev. & Ann. St. 1903, sec. 5304, requiring prosecutions for felony to be by indictment. **Idem** 260

8. **Prosecution by Information Due Process of Law.** Wilson's Rev. & Ann. St. 1903, c. 66, art. 1, sec. 4200, and Cr. Proc. c. 68, art. 5 (sections 5216-5303), relating to the examination of accused before a magistrate and prosecution by information do not render a conviction on an information for manslaughter illegal as depriving accused of his liberty without due process of law. **Idem**........... 260

9. **Ex Post Facto Law.** No ex post facto law will be enforced against the accused which would in any way be prejudicial to his rights. **State ex rel. .v Caruthers** 428

CONSTITUTIONAL LAW—Continued.

10. **"Due Process of Law"—Indictment by Grand Jury.** The words "due process of law" in the fifth and fourteenth amendments to the Constitution of the United States, and in section 7 of the Bill of Rights of the Constitution of Oklahoma (Bunn's Ed. sec. 16), do not necessarily require an indictment by a grand jury in a prosecution by the state for the crime of murder committed after statehood. **In re McNaught** 528

11. **Prosecution by Information—Self-Executing Provisions.** The provision of the Constitution that provides for and authorizes the prosecution of felonies by information after the accused has had a preliminary examination before an examining magistrate, or having waived such preliminary examination (being section 17 of the Bill of Rights [Bunn's Ed. sec. 26]), is self-executing from the time of the organization of this state. **Idem** 528

CONTEMPT.

1. **Injunction—Restraining Order Distinguished—Bond.** The fact that a bond is required by the court and given by the party applying for a restraining order at the time of its issuance will not have the effect of changing the same to a temporary injunction. It is the better practice to require bond in all such cases. **Ex parte Grimes** 102

2. **Same—Contempt—Violation of Restraining Order—Expiration of Order.** Where a restraining order fixes a day certain for the parties against whom it is secured to appear and show cause why a temporary injunction should not issue, and at the time thus fixed neither the parties nor the court take any action, the order thereby spends its force and is of no further validity, and a judgment holding a party in contempt for the violation of its terms is void, and he is entitled to be released on **habeas corpus. Idem** 102

3. **Same—Revival of Order.** Where a restraining order has spent its force by reason of no action taken on the day set to show cause, the belief of the parties to the suit that it is still effective and a motion filed by defendants for its vacation will not revive it for or against either of them. **Idem** 102

4. **Same—"Until Further Orders of this Court."** The words, "Until the further orders of this court," contained in a restraining order in conjunction with a day set for a hearing on which parties are required to show cause, if any, why a temporary injunction should not issue against them, have no other or further meaning than "in the meantime."

CONTEMPT—Continued.

Any other construction would be inconsistent with the very object of the requirement to show cause. **Idem** 102

5. **Misconduct in Summoning Talesmen.** If any officer, whose duty it shall be to summon a jury or to select and summon talesmen, when the regular panel of jurors has been exhausted, shall be guilty of unlawful, partial, or improper conduct in selecting or summoning such jurors or talesmen, he commits an act of gross contempt of court, and should be severely punished for such conduct. **Harjo v. U. S.** 590

CONTINUANCE.

1. **Absent Witnesses—Time to Prepare for Trial—Application—Discretion—Review.** First. When an application for a continuance fails to give the names of absent witnesses, or to state the facts that defendant expects to be able to prove if a continuance is granted him, it is fatally defective.

Second. When an application for a continuance is based upon the ground of want of time in which to prepare for trial, and it appears that the indictment against the defendant has been pending for six or seven weeks during which time the defendant has been represented by counsel, the application is addressed to the sound discretion of the court, and his action is not subject to review, in the absence of a showing of abuse of this discretion. **Johnson v. State** 321

2. **Application—Sufficiency.**. (a) The pendency of an indictment or information when there has been no jeopardy upon it, cannot be set up as ground for continuance, when trial is sought on a new indictment or information presented against the defendant for the same offense.

(b) An application for a continuance should allege that the defendant could not prove, by other witnesses, the same facts which he desires to prove by the absent witness, unless the testimony of the absent witness is intrinsically more valuable than that of the witnesses by whom the same facts could be proven, and then the facts which make this true must also be stated in the application.

(c) An application for a continuance, which consists of a statement of negative conclusions of fact, is not sufficient. **Reed v. Territory** 481

"CONTRACTORS"—Who liable to pay license tax—See "Municipal Corporations."

CONVICTION OF CRIME—Credibility, how affected by—See "Witnesses," 2.

CORPUS DELICTI—See "Evidence," 4, 11.

CORROBORATION—See "Accomplices."

COUNSEL—Misconduct—See "Conduct of Counsel"; "New Trial," 2, 3.

COURTS—Statehood changes—See "Jurisdiction."

Appellate Jurisdiction—Submission by Governor to Supreme Court for Opinion—Conviction of Crime Requiring Punishment of Death. Wilson's Rev. & Ann. St. 1903, sec. 5588, 5589, provide that, immediately after a conviction requiring a judgment of death, there shall be transmitted to the Governor a statement of the conviction and judgment and of the testimony given at the trial, and that the Governor may thereupon require the opinion of the judges of the Supreme Court, or any of them, upon the statement so furnished. **Held** that, where such statement is submitted to the court for an opinion, the case is not in the Supreme Court as a suit upon which the judgment may be affirmed or reversed. **State v. Johnson** **156**

CRIMES—See different names.
Effect of statehood upon venue—See "Jurisdiction."

CRIMINAL LAW.

1. **Trial—What Law Governs.** The law in force in the Indian Territory at the time the indictment was returned against the accused shall govern the trial and disposition of such case. **State ex rel. v. Caruthers** **428**

2. **Public and Speedy Trial—Constitutional Provisions.** The provisions of the sixth amendment to the Constitution of the United States, guaranteeing the accused a speedy public trial, were applicable to the Indian Territory. **Idem** **428**

3. **Definition of "Speedy Trial."** By a speedy trial, as provided for by sections 2192 and 2193 of Mansfield's Digest of the Laws of the State of Arkansas, is meant a trial conducted according to the fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and causeless delays caused or brought about by the officers of the state or county upon whom devolves the duty of the prosecution and determination of criminal cases; and, unless good cause to the contrary is shown, every person indicted for crime under the law in force in the Indian Territory prior to statehood is entitled to be tried before the end of the third term of the court, in which the indictment is pending, held after the return of the indictment, unless the delay happens on the application of the accused. **Idem** **428**

DEATH PENALTY—See "Punishment."

DECLARATIONS—Res gestae—See "Evidence," 6.
Of conspirators—See "Evidence," 9.
Dying declarations—See "Homicide," 6, 7, 8, 9.

DISCHARGE—Loss of further jurisdiction of prisoner—See "Sentence and Commitment."

DISCRETION OF COURT—See "Continuance."
Change of Venue—See "Venue."

DISMISSAL—See "Mandamus," 5.

DUE PROCESS OF LAW—Prosecution of felonies by information—See "Constitutional Law," 8, 10.

DYING DECLARATIONS—See "Homicide," 6, 7, 8, 9.

ERROR—See "Appeal and Error."

EVIDENCE—See "Bail," 1, 2, 3; "Conspiracy"; "Habeas Corpus," 1, 10, 11; "Intoxicating Liquors," 11; "Larceny"; "Rape," 4; "Witnesses."
Review in appellate courts—See "Appeal and Error."
Threats—See "Homicide," 2.
Instruction on circumstantial—See "Instructions," 2.
"Evenly balanced"—See "Instructions," 10.
Good character—See "Instructions," 15.
Of former adjudication—See "Judgment," 1, 2.
Newly discovered—See "New Trial," 4.

1. **Hearsay—Former Evidence—Death of Witness.** Proof of the return of an officer on a subpoena that the witness is dead, the same not being authorized or required by law, and by the oral evidence of witnesses that they had been informed of his death, is insufficient to establish this as a fact to render competent in a final trial the testimony of such witness taken and transcribed at the preliminary examination. **Driggers v. U. S.** 167

2. **Overtures to Witnesses..** To admit in evidence overtures to purchase witnesses to testify in defendant's behalf, where it is not shown that defendant was responsible therefor, is error. **Bruner v. U. S.** 205

3. **Evidence of Independent Assault—Purpose—Instructions.** Where, in a homicide case, evidence is admitted of an independent assault made by a third party unknown to defendant upon deceased, by reason of which deceased was being taken home and killed on his way by defendant, the purpose and effect of such evidence should be set out by the court in an instruction limiting it in its operation to an explanation of the presence of the deceased at the place of the homicide. **Idem** 205

4. **Corpus Delicti.** It is not essential that the corpus delicti should be established by evidence independent of that

EVIDENCE—Continued.

which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence. **George v. U. S.** 307

5. **Hearsay—Non-citizenship in Indian Tribe—Declarations.** Reputation or hearsay is admissible in all matters of pedigree, and so the declarations of the defendant that he is a white man, and his general reputation for 25 years that he was a white man, is sufficient when uncontradicted to prove noncitizenship in any Indian tribe or nation. **George v. U. S.** 307

6. **"Res Gestae"—Declarations.** Declarations, to be a part of the **res gestae,** need not be precisely coincident in point of time with the principal fact. If they spring out of it, shed light upon and tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberation and fabrication, then they are to be regarded as contemporaneous, and are admissible as evidence. **Price v. State** 358

7. **Threats—Explanation.** When threats are relied upon as part of the ground for reasonable apprehension of danger, it is proper to admit any evidence which will tend to show the true character of the threats so made, and which tends to add weight to or detract from them. **Price v. State** 358

8. **Giving Weight to Threats—Motive by Decedent.** When there was evidence of threats to kill the defendant, and that deceased had fired the first shot in the fatal difficulty, it was error to refuse to allow the defendant to prove that the deceased was under indictment for arson for burning a barn of the defendant, and that defendant was a witness against deceased on the charge of arson. This evidence was admissible, upon the ground that it tended to show motive on the part of deceased to kill defendant, and the further ground that it gave additional weight to the threats made, as ground of reasonable apprehension of danger, on the part of defendant. **Price v. State** 358

9. **Declarations of Conspirators.** Where there is the least degree of acting together between two or more parties in the perpetration of an unlawful act, the threats or declarations of one, in furtherance of the common design, are admissible against all of his associates, although made in the absence of the others. **Price v. State** 358

10. **Res Gestae—Statements of Defendant.** Statements made by a defendant, which constitute a part of the **res gestae,**

EVIDENCE—Continued.

are just as admissible in his favor as res gestae statements of the deceased are admissible against a defendant. **Price v. State** 358

11. **Corpus Delicti—Sufficiency of Evidence.** To warrant or sustain a conviction for crime, there must be evidence sufficient to prove that the offense was committed, and also to inculpate the defendant in the commission thereof. **Hinsley v. U. S.** 392

12. **Other Offenses.** Evidence is admissible that tends directly to prove the defendant guilty, although it may also tend to prove a distinct felony and thus prejudice the accused. **Vickers v. U. S.** 452

13. **Same.** On a trial for rape, evidence of other independent crimes, such as burglary and larceny, committed by defendant in another state, is inadmissible. **Idem**........... 452

14. **Inspection by Jury—Contents of Bottle.** It is not error to permit a jury to inspect, look at, and smell the contents of a bottle which has been properly identified and admitted in evidence and is alleged to contain whisky. **Reed v. Territory** 481

15. **Judicial notice—Geographical Facts.** Courts of this state take judicial notice of the boundaries of the state and of the counties in the state, and also of the geographical locations and positions of the towns and cities within their jurisdictions. **Idem** 481

16. **Admission of Photographs.** (a) As to whether a photograph of a place or premises, on which it is charged that an offense was committed, is admissible in evidence, in any particular situation of a trial, is within the discretion of the trial judge; and his determination will not be disturbed if there was any reasonable ground therefor.

(b) When the photographer who made the photographs of the premises where the homicide took place testified that they did not correctly show the distances and the relation of the objects which they purported to represent, it was not error for the trial court to refuse to allow them to be introduced in evidence.

(c) Photographs of persons, when proven to be correct, and when relevant to some issue in a case, are admissible in evidence. **Morris v. Territory** 617

17. **Opinion—Matters of Common Knowledge—Harmless Error.** Expert testimony is not admissible upon questions which the court or jury can decide upon the facts. When the relation of facts and their practicable results can be

EVIDENCE—Continued.

determined without special skill or study, the facts themselves must be given in evidence, and the conclusions and inferences must be drawn by the jury; but, to render the admission of such expert testimony reversible error, it must tend to solve or to determine some issue in the case adversely to the accused, and if it be clear that its admission did not do so, or in some manner injuriously affected the accused, this court will not reverse the judgment of the court below because of its admission. **Byers v. Territory** 677

EXCEPTIONS—See "Instructions," 9.

Record on appeal—See "Appeal and Error."

EX POST FACTO—See "Constitutional Law," 9.

FELONIES—Prosecution by information—See "Constitutional Law," 6, 7, 8, 10, 11.

FORGERY—See "Indictment and Information," 7, 8.

1. **Intent—"Uttering Forged Check."** To constitute the offense of uttering a forged check, there must be an intent to cheat and defraud, and a knowledge of the falsity of the instrument. **Wells v. Territory** 469

2. **Instructions—Knowledge of Accused.** Under a statute defining the offense of uttering forged instruments knowing them to be forged, it is error to instruct the jury that they should find that defendant had knowledge of the forgery. "If he had notice of any suspicious facts or circumstances which were sufficient to put a reasonably prudent and cautious person upon inquiry, which, if followed up, would have led to knowledge of its forgery, then he would be chargeable with notice of the character of the check." **Idem** 469

3. **Guilty Knowledge.** Guilty knowledge knowledge that an instrument is forged may be found if the jury is satisfied from the facts and circumstances shown by the testimony that the defendant had reason to believe it was forged; but the inference is for the jury, and does not follow of necessity. **Idem** 469

FORMER JEOPARDY—See "Habeas Corpus," 5.

1. **Plea—Striking from Record.** First. When a defendant has been tried and convicted of an offense, and a new trial has been granted him, and, upon his being placed upon trial on the same indictment again, a plea of former jeopardy, based upon the first conviction, does not present a defense in the case.

FORMER JEOPARDY—Continued.

Second. When a plea of former jeopardy does not state facts which constitute a defense, it is not error for the trial court to refuse to direct the jury to find a special verdict on such plea, but it should be stricken from the record of the case. **Johnson v. State** 321

2. **Plea—Sufficiency—Identity of Offenses.** (a) If a plea of former acquittal or former jeopardy shows upon its face a different offense from that for which the defendant is then on trial, or if it is otherwise fatally defective, it should not be submitted to the jury, but should be stricken from the record of the court.

(b) If, in the same affray, a person shoots and kills one person, and by a second shot kills another person, he may be separately prosecuted for killing each of them, and may be properly acquitted in one case and convicted in the other. **Morris v. Territory** 617

GOVERNOR—Review of conviction requiring death penalty—See "Courts."

GRAND JURY—Irregular drawing—See "Indictment and Information," 10.

1. **Drawing—Fatal Irregularity.** Facts held to render grand jury illegal, the jury box not having been prepared in accordance with sec. 3313 of Wilson's Rev. & Ann. St. 1903. **McGinley v. Territory** 24

2. **Summoning Talesmen—Common Law.** It was not error, at the time this case was tried in the court below, to summon a grand jury by means of an open venire issued to the United States marshal of the county to summon a grand jury from the body of the county, when the names were exhausted from the regular jury box of the county. **Cavett v. Territory** 493

3. **Challenge to Panel—Selection During Term.** It is not error for the trial court to overrule a challenge to the entire panel of the grand jury because the grand jury was selected after the commencement of the term of the district court at which the indictment complained of was returned instead of before the commencement of such term, as provided by an act of Congress approved February 9, 1906 (Act Feb. 9, 1906, c. 155, 34 Stat. 11), entitled "an act to provide for the selection of grand and petit jurors for the district courts in the territory of Oklahoma"; the provisions of said act as to the time of the selection of the grand jury being directory only. **Price v. Territory** 508

HABEAS CORPUS—See "Bail"; "Contempt"; "Constitutional Law," 4.

Conviction based on void ordinance—See "Municipal Corporations."

1. **Hearing—Evidence—Insufficiency.** Where a person in custody alleges in his petition for writ of **habeas corpus** in the Supreme Court, that another court of competent jurisdiction has made an order granting him bail after indictment for a capital offense, and the evidence on the hearing shows that no such order was ever entered of record in the office of the clerk of the court alleged to have granted the same, there is a failure of proof on the part of the petitioner to establish the existence of such order, and his application for the writ should be denied. **Ex parte Stevenson** **127**

2. **Object of Writ.** The writ of **habeas corpus** is not designed to operate as a writ of error or certiorari, and does not have their effect. It deals with irregularities which render proceedings void. **Ex parte Patman** **141**

3. **Procedure—Review of Facts.** The court on **habeas corpus** will not, for the purpose of discharging the relator, consider the sufficiency of facts relied on as evidencing that he is being prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may have testified or produced evidence in another court. **Idem** **141**

4. **Same.** The writ of **habeas corpus** cannot be resorted to for the purpose of discharging the relator on a plea set up in the petition praying for such writ that by indictment in a court of competent jurisdiction he is being prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may have so testified or produced evidence in such court. **Idem** **141**

5. **Grounds—Former Jeopardy.** The writ of **habeas corpus** cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. **Ex parte Johnson,** **286**

6. **Jurisdiction—Courts.** The Criminal Court of Appeals, the Supreme, district and county courts, and the justices and judges thereof, have concurrent original jurisdiction in **habeas corpus. Ex parte Johnson** **414**

7. **Commitment—Inquiry into Validity—"Process Issued Upon Final Judgment."** An order of commitment to hold for trial, issued by a magistrate before whom a person is brought for examination upon a felony charge, after such examination is concluded and a finding made, that there is sufficient cause to believe defendant guilty of a felony, is not "a process issued on any final judgment of a court of competent jurisdiction." **Idem** **414**

HABEAS CORPUS—Continued.

8. **Scope of Inquiry.** Before indictment or information filed, the duty of the court or judge upon **habeas corpus** hearing is similar to that of the magistrate upon the preliminary examination, and determines only the particular restraint complained of, and is not necessarily final. **Idem** **414**

9. **Successive Applications.** An order of a district judge remanding a prisoner on **habeas corpus** does not preclude him from making application to this court for **habeas corpus.** The constitutional right of the writ is not exhausted by the first remanding order. **Idem** **414**

10. **Grounds of Relief—Want of Evidence.** Where there is no legal or competent evidence to sustain it, an order of commitment is void. **Idem** **414**

11. **Murder—Evidence—Sufficiency.** Where there is evidence to connect a petitioner charged with murder with the time, place, and motive for killing, the writ will be denied, and petitioner remanded. **Idem** **414**

12. **Judgment Valid on Face.** Under section 2411, Gen. St. 1908, a judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of **habeas corpus** issued for the relief of a prisoner imprisoned by virtue of such judgment. **In re McNaught** **528**

13. **Irregularities in Selection of Jury.** Irregularities in the selection and impaneling of the trial jury do not affect the jurisdiction of the court so as to justify release by **habeas corpus** of a person so convicted. **Idem** **528**

14. **Scope of Review.** The review of a judgment of conviction and imprisonment by writ of **habeas corpus** is limited to the questions: Had the court which rendered the judgment jurisdiction of the subject-matter and of the person convicted? And did the court in the course of the proceedings which resulted in the judgment exceed its jurisdiction? **Idem** **528**

15. **Sentence Excessive.** If the vice of the sentence relied on is that it is oppressive and excessive in character, and not that it is of an entirely different character from that authorized by law, to the extent that it is void, the prisoner will be remanded. **Idem** **528**

16. **Same—Remedy by Appeal.** The Criminal Code of Oklahoma provides that: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon

HABEAS CORPUS—Continued.

such conviction may in its discretion sentence such offender to imprisonment during his natural life, or for any number of years not less than such as are prescribed." And the Criminal Court of Appeals will not on habeas corpus review the question of excessive punishment. **Idem** 528

HARMLESS ERROR—See "Appeal and Error."

HEARSAY—See "Evidence," 1, 5.

HOMICIDE—See "Former Jeopardy," 2; "Murder."

1. **Instruction—"Mutual Combat."** A charge that if defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of defendant, and the defendant, knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, going to the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder, was not, under the theory of the prosecution and the evidence in this case, erroneous. **Driggers v. United States** 167

2. **Threats—Purpose of Reception—Instructions.** It is error for a court to charge the jury in a murder case that proof of threats on the part of the deceased are admissible for the purpose of showing whether or not the deceased was the aggressor or the defendant was more likely to be the aggressor, and that evidence of threats is permitted for that purpose, and that alone. **Price v. U. S.** 291

3. **Manslaughter—Instructions.** It is error for the court to charge the jury in a murder case, "You may find the defendant guilty of manslaughter, in which case the court assesses the punishment; the court having it within his power to sentence the accused to confinement in the penitentiary for any length of time not exceeding ten years." **Idem** 291

4. **Instructions—Self Defense.** (a) It is error to instruct the jury that "it must be apparent from the evidence that the circumstances and surroundings of the defendant, at the time of the homicide, were such as to cause in him a reasonable belief, founded upon reasonable evidence that he was in danger of death or great bodily harm at the hands of the deceased," before his right of self-defense would arise. The jury are not required to find him innocent, but must acquit, unless his guilt is proven beyond reasonable doubt.

HOMICIDE—Continued.

(b) In a murder case, the jury should be affirmatively, clearly, and distinctively instructed that they must determine, from the defendant's standpoint, the question of his guilt or innocence, and as the facts and circumstances in evidence reasonably appeared to him at the time of the homicide. **Price v. State** 358

5. **Negative Instructions—Threats.** When threats, in connection with reasonable appearance of danger, are relied upon, the court should clearly and affirmatvley instruct the jury as to the bearing of threats upon reasonable appearance of danger. A negative instruction upon this matter is insufficient. **Price v. State** 358

6. **"Dying Declarations"—Condition of Declarant.** In order to render dying declarations admissible, it must be shown that the declarant was not only in **articulo mortis,** but under the sense of impending death, without hope of recovery, at the time such declarations were made. **Bilton v. Territory** 566

7. **Same—Sense of Impending Death.** Contradictory statements as to expectations of impending death may prevent the admission of a statement as a dying declaration. **Idem** 566

8. **Same—Presumptions.** The court in a prosecution for homicide, in which dying declarations are sought to be introduced in evidence, will not presume in the absence of evidence that a man who has been injured, though seriously, must necessarily feel that he is about to die, and on such presumption admit his declaration. **Idem**.... 566

9. **Same—Credibility.** When dying declarations are offered in evidence, it becomes the duty of the trial court to first determine whether the declarant was in **extremis,** and whether he had lost all hope of recovery at the time the declaration was made; and, if such declaration is admitted as competent, it is then for the jury to pass upon its credibility. **Idem** 566

10. **Instructions—Grade or Degree of Offense—Questions for Jury.** In a prosecution for murder, the court should submit the case to the jury for consideration upon every degree of homicide which the evidence in any reasonable view of it suggests; and, if the evidence tends to prove different degrees, the law of each degree which the evidence tends to prove should be submitted to the jury, whether it be requested on the part of the defendant or not. It is the duty of the court to say, as a matter of law, if there is any evidence that would tend to reduce the degree of the offense to manslaughter in the second degree. **Cannon v. Territory** 600

HOMICIDE—Continued.

11. **Evidence—Threats.** (a) Threats made by a third person against a defendant are not admissible until some evidence has been introduced which would give the defendant reasonable ground to believe that such third person was acting with the deceased in a common design to injure or kill the defendant.

(b) "Have you heard any of the Cassidays make any demonstrations or statements against the life of the defendant?" **held** to be an improper question, as being too general.

(c) When a defendant seeks to introduce threats made by a third person against him, the question as to such threats must indicate what particular person is being inquired about, so that the court can determine its relevancy to the issues in the case.

(d) When threats have been communicated to a defendant, evidence of this fact is admissible, when relevant, without requiring proof that such threats were actually made by the deceased.

(e) For a discussion of the philosophy of the law relating to evidence of threats, see opinion. **Morris v. Territory** 617

12. **Premeditation—Anger or Intoxication.** (a) If from any cause, at the time of the homicide, the mind of the defendant was in such a condition as to be incapable of forming a premeditated design to effect the death of the person slain, or of any other human being, he cannot be guilty of murder, unless it be proven that this state of mind, at the time of the killing, grew out of his intentional and wrongful conduct, of such character as to show that the killing was the result of previous premeditation and formed design.

(b) The mere fact that a defendant may be angry or in a condition of voluntary intoxication will not prevent an unlawful killing from being murder, provided that the defendant was in such a condition as to be able to form a design to effect the death of the party slain or any other human being. **Idem** 617

13. **Instructions—"Passion," "Anger"—Separation of Offenses.** (a) The use of the word "passion" or "excitement" in defining murder, in addition to the word "anger," used in the statute, does not render the instructions more burdensome to the defendant or take from him any substantial right.

(b) When, in the same affray, a defendant by separate shots kills two persons, and has been indicted, tried,

HOMICIDE—Continued.

and acquitted for the murder of the person killed by the first shot, and is upon trial for the murder of the second person so killed, the court should instruct the jury that the prosecution is bound by the issues necessarily determined in the first trial, and that said judgment of acquittal is conclusive, and the issues therein determined cannot be tried again; and that the jury must hold the defendant justifiable in killing such first person, and that no presumption of guilt could be entertained against the defendant, upon his trial for murder of the second person killed, on account of such first killing. **Idem** 617

IMPEACHMENT—See "Witnesses."

IMPRISONMENT—Definition—See "Punishment," 1.

INDIANS.

Proof of Race—Punishment. In this case the evidence should affirmatively show that the defendant is not an Indian before the question of the death penalty could be submitted to the jury. **Vickers v. U. S.** 452

INDICTMENT AND INFORMATION—See "Rape."
Prosecution of felonies by information—See "Constitutional Law," 6, 7, 8, 10, 11.
Effect of statehood upon venue—See "Jurisdiction."
Variance requiring new indictment—See "Trial," 2.

1. **Amendment.** An information charging defendant with imputing to a female a want of chastity, under an act approved March 13, 1905 (Sess. Laws 1905, p. 196, c. 13), cannot be so amended, after acquittal, as to charge defendant with lascivious language in a public place, under Wilson's Rev. & Ann. St. Okla. 1903, sec. 1959, without being sworn to as provided in section 1883 of said statute. **Hubbard v. Territory** 131

2. **Decedent—Weapon—Description.** First. Where an indictment charges the defendant with the murder of "Mary Cuppy," it is not necessary to allege that "she" was a human being, this being a matter of proof, rather than of pleading.

Second. Where an indictment for murder alleges that the wounds that caused death were inflicted with "a piece of two-inch plank" or "an ax handle" it is not necessary to allege that these instruments were deadly weapons, or to give their size, weight or dimensions. **Johnson v. State** 321

3. **Language of Statute.** In an indictment for committing an offense against a statute, the offense may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars

INDICTMENT AND INFORMATION—Continued.

essential to constitute the offense or crime, and to acquaint the accused with what he must meet on the trial. **Weston v. Territory** 407

4. **Intoxicating Liquors—Illegal Sale—Name of Purchaser.** An information or indictment for selling malt, spirituous, or vinous liquors, or any intoxicating drinks, in violation of section 3407, Wilson's Rev. & Ann. St. 1903, must give the name of the person to whom the sale was made, so that the defendant may know what particular offense he is called upon to defend against. **Idem** 407

5. **Same—Pretexts.** An information for giving away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, in violation of section 3407, Wilson's Rev. & Ann. St. 1903, must state the name of the person to whom the gift was made, and the pretext under which the gift was made must also be stated, so that the defendant may know what offense he is required to defend against. **Idem** 407

6. **Certainty and Particularity.** In framing an indictment the general rule is "that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that conviction or acquittal on it may be pleaded in bar of another indictment for the same offense." **Vickers v. U. S.** 452

7. **Duplicity.** Under the provisions of Code Cr. Proc. sec. 224 (Wilson's Rev. & Ann. St. 1903, sec. 5360, an indictment is bad for duplicity that charges two distinct offenses in one count—that is the uttering of a check knowing it to be forged, and the forging of the indorsement thereon and then uttering the same—and a demurrer thereto should be sustained. **Wells v. Territory** 469

8. **Immaterial Variance.** Section 482, Code Cr. Proc. (Wilson's Rev. & Ann. St. 1903, sec. 5618, provides that: "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Where the indictment charges that the check was delivered to Katz Bros., a firm composed of Jacob Katz and Isaac Katz, partners, doing business under the firm name of Katz Bros., if the check was in fact passed to Katz Bros., a corporation, doing business under the corporate name of Katz Bros., of which corporation Jacob Katz and Isaac Katz were stockholders and officers, such variance is not material. **Idem** 469

9. **Sufficiency—Language of Statute.** When an indictment uses substantially the same language in charging an offense as is used in the statute in creating the offense, the

INDICTMENT AND INFORMATION—Continued.

indictment is sufficient. **Reed v. Territory** 481

10. **Jury—Motion to Set Aside Indictment—Sufficiency—Affidavit—Selection and Drawing of Panel—Officer Who may Act as Deputy.** (a) A general allegation that the grand jury which found the indictment was not properly and legally drawn is too indefinite and uncertain to require notice.

(b) Under the act of Congress of February 9, 1906, 34 Stat. 11, c. 155, a deputy clerk could perform the purely ministerial duties directed to be performed by the clerk of the court, in the matter of recording the list of the jurors upon the journals of the court, and certifying to the correctness thereof.

(c) An application to take evidence to sustain a motion to set aside an indictment, upon the ground that the jury was not properly drawn and impaneled, must be supported by an affidavit in which the allegations of the motion are alleged to be true.

(d) It is not error to overrule a motion to set aside an indictment, when the facts alleged in the motion are not sufficient to show that the motion should be sustained, if proven to be true. **Idem** 481

11. **Pleas in Abatement—Pendency of Other Indictment or Information.** (a) The fact that an indictment or information is pending against a defendant will not, of itself, prevent a grand jury from finding another indictment against the defendant for the same offense.

(b) The pendency of an indictment or information against a defendant, when there has been no jeopardy upon it, cannot be pleaded, either in abatement or bar to a second indictment or information for the same offense. **Idem** 481

12. **"Information"—Officer Authorized to File.** In England, at common law, an "information" was an accusation of a criminal character exhibited against a person charging him or her with a criminal offense by the Attorney General or the Solicitor General and under his oath of office. In the United States, in the absence of statutes changing its character, it is filed by the officer, whatever his title, who exercises the function of prosecuting attorney for the county. **In re McNaught** 528

13. **Concurrent Remedies in Felonies.** The Constitution of Oklahoma (Const. art. 2, sec. 17 [Bunn's Ed. sec. 26]) authorizes prosecutions for felonies by information after examination and commitment by a magistrate without in-

INDICTMENT AND INFORMATION—Continued.

dictment by a grand jury. The criminal procedure act, being chapter 18, Gen. St. 1908, makes provisions for a preliminary examination before a committing magistrate in the presence of the accused, who is entitled to the aid of counsel and the right of examination of witnesses, whose testimony may be reduced to writing at his request; and upon a finding by the magistrate that a felony has been committed, and that there is sufficient cause to believe the accused guilty thereof, an order, holding him to answer thereto before the district court of the county in which the offense is triable, shall be made, and the prosecution in that county may be by indictment or information, as they are concurrent remedies. **Idem**.... 528

14. **Same.** A conviction after examination and commitment upon a written complaint charging the crime of murder, committed after statehood, upon information duly verified and filed in the district court for murder, and a trial, and conviction of manslaughter in the first degree, and sentence for life imprisonment thereon, are not illegal and void. **Idem** 528

15. **Formal Requisites.** It is not necessary that indictments, informations or affidavits shall, upon their faces, show that they are being prosecuted in the name and by the authority of the state. It is sufficient if this appears from the record. **Arie v. State** 666

INFORMATION—See "Indictment and Information."

INITIATIVE AND REFERENDUM—See "Constitutional Law," 1, 2, 3, 4.

INJUNCTION—Violation—See "Contempt."

INSTRUCTIONS—See "Accomplices"; "Appeal and Error," 4, 11, 12; "Evidence," 3; "Homicide"; "Rape."

1. **Reasonable Doubt.** An instruction which states "by the term 'reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for"—was erroneous, and is cause for reversal of the judgment. **Abbott v. Territory** 1

2. **Circumstantial Evidence.** Where, in a criminal case, circumstantial evidence solely is relied on for a conviction, it is error for the trial court to fail and refuse to instruct on the law applicable thereto when the defendant requests it. **Rutherford v. United States** 194

3. **Reasonable Doubt.** The trial court erred in instructing the jury that: "By the term 'reasonable doubt,' as used in these instructions, is meant a doubt that has a reason for it. It is a doubt that you can give a reason for"—and

INSTRUCTIONS—Continued.

the same is cause for reversal of the judgment. **Gibbons v. Territory** 198

4. **Possession of Stolen Property—Presumption.** It is error to instruct a jury that the possession of property recently stolen raises a presumption against the party having such possession, which requires an explanation from him; this being a charge upon the weight of the evidence. **Slater v. United States** 275

5. **Repetition.** Where a similar instruction has been given a requested instruction need not be given. **George v. U. S.,** 307

6. **Reasonable Doubt.** It is error to instruct a jury that the words "reasonable doubt" "mean a doubt for which the jury can give a reason." **Price v. State** 358

7. **Repetitions—Argumentative Instructions.** (a) It is error, by constant repetitions, to give to even a correct instruction undue prominence in the minds of the jurors. Such instructions are, in effect, a charge on the credibility of the witnesses and the weight of the evidence.

(b) It is error to instruct a jury as to the law in an argumentative manner. **Price v. State** 358

8. **Construction as a Whole—Contradictions.** (a) Instructions to juries should be considered as a whole, and when so considered, and they harmonize with each other, and present the law of the case fully and fairly, they are sufficient.

(b) Where there is a correct instruction upon a material question in a case, and in another portion of the instructions there is an incorrect statement of the law upon the same question, it cannot be said that the law has been clearly and fully given to the jury, and reversible error has been committed. **Price v. State** 358

9. **Exceptions to Instructions.** (a) Statement of objections of the court to the practice of taking exceptions to each and all of the instructions given to the jury, which practice, while permissible under section 5518, Wilson's Rev. & Ann. St. 1903, is not to be commended.

(b) Instruction on alibi, which, while not indorsed as a model, is held sufficient under the facts in this case. **Buck v. Territory** 517

10. **Evidence "Evenly Balanced."** The accused in a murder case having put in evidence his general reputation as a peaceable, law-abiding citizen in the community where he resides, it is error for the trial court to instruct the jury that, if the evidence independent of the testimony in refer-

INSTRUCTIONS—Continued.

ence to character is found to be evenly balanced, then evidence of character would be sufficient to turn the scale in favor of the accused. In a criminal case, if the evidence is equally balanced, the accused is entitled to a verdict of acquittal. **Bilton v. Territory** 566

11. **Oral Statements by Court.** Oral statements, made by the court to the jury with reference to the form of their verdict, which do not contain directions or "instructions" upon some question of law involved in the trial, or comment on the evidence do not come within the statute requiring instructions to the jury to be reduced to writing unless waived by the defendant. **Douglas v. Territory** 583

12. **"Reasonable Doubt."** The phrase "beyond a reasonable doubt," used in the statute in establishing the measure of proof necessary to warrant a conviction in a criminal case, is not a technical term, and needs no explanation from the courts in instructing juries. An instruction on this subject, in the language of the statute is all that the court is required to give. It is a dangerous thing for the courts to attempt to go further. **Idem** 583

13. **Applicable to Testimony.** (a) It is the duty of the trial court to give instructions applicable to the testimony of a defendant, and based upon the hypothesis that it is true; and, when such an instruction is given, the defendant cannot be heard to complain.

(b) In this case the defendant was a peace officer. His testimony was to the effect that a difficulty was in progress when he commanded the deceased to drop his pistol, whereupon the deceased turned upon defendant, presented his pistol towards the defendant, and threatened to kill him, when the defendant fired the fatal shot. See opinion, for instructions properly given applicable to this testimony. **Douglas v. Territory** 583

14. **Reasonable Doubt.** It is not reversible error, in a prosecution for murder, to define reasonable doubt in a series of instructions, the definition as a whole being correct, rather than to embody the entire definition in one instruction; no prejudice from the practice appearing. **Cannon v. Territory** 600

15. **Character of Defendant—Weight and Effect of Evidence.** The weight of the evidence tending to prove the good character of the defendant is for the jury, who, in arriving at their verdict, should consider it the same as any other evidence in the case. Instruction given held not misleading nor erroneous. **Idem** 600

16. **Construction as a Whole.** Instructions to juries must be

INSTRUCTIONS—Continued.

considered as a whole, and when so considered, if it appears that the law applicable to each issue in the case has been correctly given and the instructions are not contradictory or misleading, they are sufficient. **Morris v. Territory** 617

17. **Paragraphing.** When a defendant is on trial on the charge of murder, it is not necessary for the trial court to state the law upon any given issue applicable to the evidence of the defense in a separate paragraph from the law applicable to the evidence of the prosecution upon the same issue. When it can be done, the court may state in one paragraph the law applicable to the evidence on both sides of an issue. **Morris v. Territory** 617

18. **Good Character—Requested Instructions.** (a) The better and safe practice is for trial courts, when evidence of the good character of the defendant is proper and has been introduced, to instruct the jury upon this issue.

(b) In instructing on character the court should exercise care not to trench upon the province of the jury. All that is necessary for the court to do is to inform the jury that they may give to evidence of character such weight as they may deem proper in connection with all the other testimony in the case, and the doctrine of reasonable doubt.

(c) When a defendant requests an instruction, applicable to any issue in a case, and the trial judge should be of the opinion that the law is not correctly stated in such requested instruction, it is the duty of the trial judge to modify such requested instruction, or to give an instruction containing a correct statement of the law. **Idem** 617

19. **Requested Instructions Covered by Instructions Given.** It is not error for the court to refuse to instruct the jury at the request of the accused, if such requested instructions, though proper, are fairly covered by the general instructions given the jury by the trial court. **Byers v. Territory** 677

INTERSTATE COMMERCE—See "Intoxicating Liquors," 4.

INTOXICATING LIQUORS—See "Indictment and Information," 3, 4, 5; Use by juror—See "Jury," 3.

1. **Violation of Prohibitory Article of Constitution—Misdemeanor.** The offense of manufacturing, selling, bartering, giving away, or otherwise furnishing any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of the prohibition article of the Constitution, is a misdemeanor. **Ex parte Cain** 7

INTOXICATING LIQUORS—Continued.

2. **Same—Punishment.** The maximum punishment for said offense is by imprisonment in the county jail not exceeding one year, and by fine not exceeding $500. **Idem** 7

3. **Same—Prohibition Article Self-Executing.** The prohibition provision in the Constitution prohibiting the manufacture, sale, barter, or giving away of any intoxicating liquors, including ale, beer, and wine, contrary to said provisions is valid and self-executing. **Idem** 7

4. **Interstate Commerce.** Under subdivision 3, sec. 8, art. 1, of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, a resident of one state has the right to have shipped to him from another state alcoholic liquors, when ordered by him for his and his family's use, and to keep the same for such use; and the state cannot, under its police power, enact laws so as to substantially hamper or burden such constitutional right to have such shipment made and to receive and retain the same for personal use. **Schwedes v. State** 245

5. **Adoption of Constitutional Provisions—Submission to Vote—Presumption of Regularity.** The prohibition article, which was separately submitted with the Constitution for ratification or rejection, the party assailing the same failing to point out in what particular it was not properly submitted in accordance with Enabling Act June 16, 1906, c. 3335, 34 Stat. 267, it having been declared adopted and accepted and recognized by the political departments of both the federal and state governments, will not be declared by the courts invalid, on the ground that it was not properly submitted or adopted. **Arie v. State** 250

6. **Constitutional Law—Intent of Framers.** It was the intention of the framers of the Constitution that the prohibition provision, required to be incorporated therein by virtue of paragraph 2, sec. 3, Enabling Act June 16, 1906, c. 3335, 34 Stat. 269, should be enforceable in the courts of the state immediately upon the admission of the state into the Union, and the prohibition article was submitted separately with the intention that it should become effective over the entire state in like manner, if approved by the people and the Constitution was also ratified. **Idem** 250

7. **Constitutional Law—Obligation of "Contracts"—Repeal of License Law.** A license issued under a general statute to a dealer in liquors is in no sense a "contract" between the state and the licensee, and is not protected by the contract clause of the federal Constitution, being a mere permit which may be modified, annulled, or revoked at the pleasure of the legislative power. **Idem** 250

INTOXICATING LIQUORS—Continued.

8. **Same.** The laws licensing the liquor traffic (article 1, c. 49, Wilson's Rev. & Ann. St. 1903), at the time of the admission of the state into the Union, were repugnant to the provisions of the prohibition article thereof, and were not extended to, and did not remain in force in, said state. **Idem** 250

9. **Same.** A license to carry on the liquor traffic is revoked or annulled by the repeal of the law authorizing the granting of such license. **Idem** 250

10. **Same.** A liquor license, the period for which it was issued not having expired when the state of Oklahoma was admitted into the Union, was revoked and discontinued on the admission of said state; the prohibition article thereof becoming then and there effective. **Idem** 250

11. **Sale Without License—Evidence—Sufficiency. Held,** there was sufficient proof on part of the state of the fact that the defendant did not have license to retail malt, spirituous, or vinous liquors. **Reed v. Territory** 481

12. **Interstate Commerce.** Under subdivision 3, sec. 8, art. 1, of the Constitution of the United States, commonly referred to as the "interstate commerce clause" of the Constitution, a resident of one state has the right to have shipped to him from another state alcoholic liquors, when ordered by him for his and his family's use, and to keep the same for such use; and the state cannot, under its police power, enact laws so as to substantially hamper or burden such constitutional right to have such shipment made and to receive and retain the same for personal use. **Schwedes v. State** 660

JUDGES.

Change of Judge—Jurisdiction. First. Under the statute, but one change of judge can be had.

Second. The fact that the regular judge of a district may hold court in the same district and at the same time that a special judge is trying a case, in no manner affects the jurisdiction of the special judge to try such case. **Johnson v. State** 321

JUDGMENT—Jurisdiction lost by discharge from custody—See "Sentence and Commitment."

1. **Res Judicata—Burden of Proof.** The burden of proof rests upon a party who alleges a former adjudication. **Ex parte Stevenson** 127

2. **Same—Record—Evidence—Necessity.** The record entry of a judgment is indispensable to prove the evidence of

JUDGMENT—Continued.

it when it is made the basis of a claim or defense in another court. **Idem** 127

3. **Modification—Vacation—Time—New Trial.** First. If it appears to the trial court, after overruling a motion for a new trial or a motion in arrest of judgment, that there was irregularity in obtaining the judgment, it may, of its own motion, modify or set aside its order overruling the motion for a new trial or the motion in arrest of judgment. This may be done at the term of court at which the order was made; but after final judgment has been rendered, and the term expired, there must be a substantial compliance with the statute, to give the court further jurisdiction.

Second. When the trial court grants a motion for a new trial upon the ground of irregularities in obtaining the verdict, it is not necessary for the court to pass upon a motion in arrest of judgment, and the case stands for trial, just as if no verdict had been rendered therein. **Johnson v. State** 321

JURISDICTION—See "Habeas Corpus," 6.

Special review of convictions requiring death penalty—See "Courts."

Of special judges—See "Judges."

Lost by discharge from custody—See "Sentence and Commitment."

1. **Territorial Courts—Admission of State—Transfer of Causes.** Sections 16 and 20, inclusive, of the enabling act for Oklahoma, Act June 16, 1906, c. 3335, 34 Stat. 276, 277, as amended March 4, 1907, c. 2911, 34 Stat. 1286, 1287, when concurred in by the state of Oklahoma by the adoption of sections 27 and 28 of the Schedule to the Constitution, being a proper exercise of power by the Congress under article 4, sec. 3, of the Constitution of the United States, are valid. **Higgins v. Brown** 33

2. **Same—Pending Indictment for Murder.** An indictment for the crime of murder, alleged to have been committed within the jurisdiction of the United States court for the Northern District of the Indian Territory, and pending in said court on the admission of the state into the Union, is cognizable in the district court of the state, as its successor, in the county in which the offense was committed. **Idem** 33

3. **Venue—No Prosecution before Statehood.** An indictment for the crime of murder returned after the admission of the state into the Union for an offense committed under the territory of Oklahoma, where no prosecution whatever

JURISDICTION—Continued.

had been begun before said date, is cognizable in the district court of the state in the county in which the offense was committed. **Ex parte Bailey** 115

4. **Same.** Where an indictment for the crime of assault with intent to kill with a deadly weapon was returned after the admission of the state into the Union for an offense committed under the territory of Oklahoma, where no prosecution had been begun before said date, it is cognizable in the district court of the state in the county in which the offense was committed. **Ex parte Brown** 123

5. **Venue—Statehood—Transfer of Causes.** An indictment for the crime of larceny and receiving stolen property, returned by a grand jury of the Western District of the Indian Territory prior to the admission of said territory into the Union as a part of the state of Oklahoma charging that said offense had been committed within said district on the 13th day of November, A. D. 1907, is cognizable in the district court of the state in the county in which the offense was committed. **Ex parte Ellis**....... 125

6. **Venue—Offense Antedating Statehood.** Where an indictment for the crime of manslaughter, an offense committed under the laws in force in the Indian Territory, is returned after the admission of the state into the Union, no prosecution whatever having been begun prior to such date it is cognizable in the district court of the state in the county in which the offense was committed. **Ex parte Buchanen,** 135

7. **Venue—Offense Antedating Statehood.** Where an indictment for the crime of embezzlement—an offense committed under the laws in force in the Indian Territory—is returned after the admission of the state into the Union, no prosecution whatever having been begun prior to the admission of the state into the Union, except the filing of a complaint with the United States Commissioner and the issuance of a warrant and the apprehension of the prisoner, said offense is cognizable in the district court of the state in the county in which the offense was committed. **Ex parte Curlee** 145

JURY—See "Grand Jury."

Province in plea of guilty for murder—See "Punishment."

1. **Competency—Examination—Challenge.** First. The fact that a juror states, on his voir dire examination, that he has previously sat as a juror upon the trial of a murder case does not render him subject to challenge upon the ground of implied bias.

Second. The court must be clearly satisfied of the fairness of a juror, and his freedom of prejudice or bias

JURY—Continued.

against the defendant, or he should be excluded from the jury.

Third. The court is not bound by the answers of a juror on his voir dire examination but may take such other means as may be necessary to determine the competency of the juror.

Fourth. The enumerated causes for challenges in the statute are not exclusive of all other causes not enumerated.

Fifth. When a juror has an opinion as to the guilt of the defendant, based upon rumor or from reading the public press, and the court is satisfied that the opinion is such that it will not combat the evidence or resist its force, such opinion, of itself, will not render the juror incompetent to sit in the case.

Sixth. The court shall resolve all doubts as to the competency of the juror in favor of the defendant.

Seventh. It was proper to allow counsel for defendant to inquire as to what was the verdict rendered by the jury, of which the juror had formerly been a member, in order that they might intelligently exercise their peremptory challenge. **Johnson v. State** 321

2. **Separation of Jury.** Held that section 5519, Wilson's Rev. & Ann. St. 1903, imperatively requires that upon the final submission of the case to the jury, they cannot be permitted to separate, and if permitted to separate, such separation vitates the verdict, notwithstanding no affirmative evidence of prejudice is offered. **Bilton v. Territory,** 566

3. **Misconduct of Juror—Use of Liquors.** The use of intoxicating liquor as a beverage by a juror during the trial and consideration of a capital case will vitiate a verdict of guilty, and entitle the accused to a new trial. **Idem** 566

4. **Summoning—Impartiality of Officer.** It is the duty of the officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence, courage, and good moral character, but in doing this he should act with entire impartiality between the prosecution and the defendant. **Harjo v. U. S.** 590

5. **Challenge to the Array.** A challenge to the array or panel will lie for bias, partiality, or irregular action of the summoning officer. **Idem** 590

LARCENY.

1. **Ownership—Evidence.** In case of larceny it is essential for the prosecution to prove that the property was felon-

LARCENY—Continued.

iously taken from the person named in the indictment as the owner, but this does not require that in every case direct proof of ownership shall be given. **George v. U. S.,** 307

2. **Non-consent—Evidence.** The want of consent of the owner to the taking of his property alleged to have been stolen is an essential ingredient of the crime of larceny. The fact of non-consent to the taking may be proven by facts and circumstances which sufficiently show that the property was feloniously taken, and the fact that the owner caused search to be made for the stolen property is a cogent circumstance to show want of consent to the taking. **Idem** 307

3. **Sufficiency of Evidence.** Evidence reviewed, which not only sufficiently corroborates the testimony of an accomplice, but which establishes the guilt of the defendant independently of the testimony of the accomplice. **Buck v. Territory** 517

LASCIVIOUS LANGUAGE—See "Indictment and Information," 1.

LICENSE—Repeal of liquor license law—See "Intoxicating Liquors," 7, 8, 9, 10, 11.

LICENSE TAX—Conviction based on void ordinance—See "Municipal Corporations."

LIQUORS—See "Intoxicating Liquors."

MANDAMUS.

1. **When Writ Issues.** A writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right. But it is the only adequate mode of relief where an inferior tribunal refuses to act upon the subject brought properly before it. **Higgins v. Brown, Judge** 33

2. **When Lies.** The writ of mandamus will not lie except to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. **State ex rel. v. Russell, Judge** 165

3. **Same—To Judge—Admission to Bail—Records.** The writ of mandamus will not lie to compel a district judge to enter of record in the district court of a certain county in his district an alleged order admitting defendant to bail where it appears that the same is not there properly entitled to record. **Idem** 165

4. **Other Adequate Remedy.** A peremptory writ of mandamus

MANDAMUS—Continued.

will be denied where the petitioner has a plain and adequate remedy in the ordinary course of the law. State ex rel. v. Caruthers 428

5. **Office of Writ—Dismissal of Criminal Action.** The writ of mandamus is a proper remedy to enforce the dismissal of a criminal action where the right to a speedy trial has been denied, in cases where the delay is caused by the abuse of discretion by the trial court. **Idem** 428

6. **Parties Plaintiff—Use of Name of State.** In mandamus proceedings to enforce a private right, the real party in interest should be named as plaintiff, and such proceedings should not be entitled in the name of the state on the relation of such party. **Idem** 428

MISCONDUCT OF COUNSEL—See "Conduct of Counsel"; "New Trial," 2, 3.

MUNICIPAL CORPORATIONS—When ordinances become subject to referendum—See "Constitutional Law," 3.

1. **Taxation—Grant of Taxing Power—Strict Construction.** A grant by the Legislature of taxing power to a municipal corporation is to be strictly construed, and any fairly reasonable doubt concerning the existence of such power is resolved by the courts against the corporation and the power is denied. All acts beyond the scope of the power granted are void. **In re Unger** 222

2. **Same—License Tax on "Contractors."** The power being granted by the Legislature to a city of the first class to levy by ordinance an occupation tax on "contractors," **held,** that the term is not sufficiently generic to cover "persons doing contract work," and that that part of an ordinance seeking to levy such tax on "persons doing contract work" is illegal and void. **Idem** 222

3. **Same—Habeas Corpus—Grounds for Discharge—Void Ordinance.** Habeas corpus will lie to discharge a petitioner restrained of his liberty by virtue of a conviction based upon a void ordinance. **Idem** 222

MURDER—See "Habeas Corpus," 11; "Homicide"; "Punishment."

Capital Punishment—Facts Warranting. Facts held to sustain a verdict of guilty of murder with capital punishment. **Johnson v. State** 321

MUTUAL COMBAT—See "Homicide," 1.

NATIONALITY—See "Evidence," 5.

Proof prerequisite to death penalty—See "Indians."

NEW TRIAL—See "Appeal and Error," 7, 8; "Former Jeopardy," 1; "Judgment," 3; "Jury," 2, 3.

1. **Newly Discovered Evidence—Affidavits—Sufficiency.** In a motion for a new trial, upon the ground of newly discovered evidence, the affidavit of the defendant should set out the proposed evidence, and it must be such as could not have been secured at the former trial by reasonable diligence on the part of the defendant, and the diligence used must be stated in the affidavit. The affidavit of the witness should, if possible, accompany the motion. **Slater v. United States** 275

2. **Argument of Prosecuting Attorney.** When the remarks of the Assistant United States Attorney to the jury in a rape case appeal to their fears or vanity and tend to coerce and cajole them, it is good grounds for a new trial, and the motion for new trial should have been granted. **Vickers v. U. S.** 452

3. **Same.** When the Assistant United States Attorney in his argument to the jury went outside of the record and appealed to the passions and prejudices of the jury, and objection was made and overruled, the strength of the testimony against the defendant will be considered, and, if the improper statements may have determined the verdict, a new trial will be granted. **Idem** 452

4. **Newly Discovered Evidence.** It is not an abuse of discretion for a trial court to overrule a motion for new trial based on the grounds of newly discovered evidence, if such evidence is unimpotant, immaterial, or cumulative, and the submission of such evidence to the jury would not have produced, or tended to produce, a different verdict from that rendered in the case. **Byers v. Territory** 677

ORDINANCES—Petition for referendum as ground for discharge from conviction for violation—See "Constitutional Law," 1, 2, 3, 4.

Conviction based upon void ordinance—See "Municipal Corporations."

OWNERSHIP—Of stolen property, proof—See "Larceny."

PARTIES—See "Mandamus," 6.

PHOTOGRAPHS—See "Evidence," 16.

PLEA OF GUILTY—In murder, province of court and jury—See "Punishment."

POSSESSION OF STOLEN PROPERTY—See "Instructions," 4.

PRESUMPTIONS—See "Bail," 4, 7.
Possession of stolen property—See "Instructions," 4.
Of regularity of court proceedings—See "Trial," 3.

PROHIBITION—See "Intoxicating Liquors."

PUNISHMENT—See "Courts"; "Indians"; "Murder"; "Rape," 2, 4, 5.

1. **"Imprisonment."** The word "imprisonment," in its ordinary sense, contemplates and means within the common jail, rather than in the penitentiary. **Ex parte Cain** 7

2. **Murder—Plea of Guilty—Submission to Jury.** Under Wilson's Rev. & Ann. St. 1903, sec. 2174, providing that on an indictment for murder, where there is a plea of guilty, the court shall determine the punishment, it is the duty of the court on such a plea to fix the punishment, without submission of that question to the jury. **State v. Johnson** 156

3. **Same—Proceedings on Plea of Guilty—Irregularity.** Defendant in an indictment for murder, having refused to plead thereto, the clerk was instructed by the court to enter a plea of not guilty, whereupon both parties announced ready for trial, and a jury was duly impaneled, and the county attorney made his opening statement. Defendant's counsel then announced that defendant desired to plead guilty, and defendant, on inquiry by the court, stated that he wanted to plead guilty, and stated further to the jury that he did plead guilty. Thereupon the court instructed the jury to determine the punishment to be inflicted, and the verdict found the defendant guilty as charged, and fixed his punishment at death. No evidence was received as to his sanity, nor was he cautioned as to the effect of his plea. **Held,** that such proceedings were so irregular that it cannot be said that defendant was convicted according to law. **Idem** 156

RAPE.

1. **Indictment—Sufficiency.** An indictment for rape under section 911, Ind. T. Ann. St. 1899 (Mansf. Dig. sec. 1568), that omits to allege that the accused "did carnally know, forcibly and against her will," or at least allege "sexual intercourse against the will and without the consent" of the female, is fatally defective. **Vickers v. U. S.** 452

2. **Punishment—Capital Punishment.** A verdict of guilty "without capital punishment" may be rendered in a rape case under Act Cong. Jan. 15, 1897, c. 29, 29 Stat. 487 (U. S. Comp. St. 1901, p. 3620), even if there are no mitigating or palliating circumstances. **Idem** 452

3. **Instructions—Grade of Offense.** Where the proof is inconclusive as to the consummation by penetration, and the proof is evident as to assault with intent to commit rape, it is the duty of the trial court to instruct the jury of their right to convict of the lower offense. **Idem** 452

RAPE—Continued.

4. **Evidence—Sufficiency.** A conviction of rape with sentence of death cannot be based on contradictory testimony of the prosecutrix as to whether or not there was penetration. **Idem** 452

5. **Instructions—Punishment.** It is the duty of the trial court to instruct the jury that if they shall find a verdict of guilty of rape they may qualify their verdict by the words, "without capital punishment," no matter what the evidence may be. **Idem** 452

REASONABLE DOUBT—See "Bail," 2; "Instructions," 1, 3, 6, 12.

RECORD—Preserving—See "Appeal and Error."

RECORDS—See "Judgment," 2.
Mandamus to record bail order—See "Mandamus," 3.

RES GESTAE—See "Evidence," 6, 10.

RES JUDICATA—See "Judgment."

RESTRAINING ORDER—Violation—See "Contempt."

REVIEW—See "Appeal and Error"; "Courts"; "Punishment."

SELF-DEFENSE—See "Homicide," 4.

SENTENCE AND COMMITMENT.

Jurisdiction after Discharge. When a judgment of imprisonment is imposed by a court on plea of guilty or conviction in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper officer for incarceration; and where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment. **Ex parte Clendenning** 227

SPEEDY TRIAL—See "Criminal Law."

STATUTES—Construction of penal statutes—See "Appeal and Error," 24.

Construction—Statute Adopted from Another State. Whenever Congress, in legislating for the Indian Territory, borrowed from the statutes of a state provisions which had received in such state a known, defined, and settled construction before such act of Congress was passed, that construction should be deemed to have been adopted by the courts over which such legislation extended; and the provisions of such laws should be construed as they were understood at the time in the state from which the same were borrowed. **State ex rel. v. Caruthers** 428

TAXATION—Power of cities to levy license tax—See "Municipal Corporations."

THREATS—See "Evidence," 7, 8; "Homicide," 2, 5, 11.

TRANSFER OF CAUSES—See "Jurisdiction."

TRIAL—"Speedy trial"—See "Criminal Law."

1. **Conduct of Court—Intimation of Opinion.** It is improper for a trial judge, either directly or indirectly, to let the jury know, or even to intimate to them, what his opinion is as to the credibility of any witness testifying in a case before him. **Slater v. U. S.** 275

2. **Variance—Discharge of Jury—New Indictment.** Where, upon the trial of a case, it appears to the court that there is a variance between the allegations of the indictment or information and the testimony introduced, and the jury is discharged upon this ground, and it is the opinion of the court that a new indictment or information can be framed upon which the defendant can be legally convicted, it is the duty of the court to commit the defendant to custody, or to admit him to bail until such new indictment or information can be presented against him. **Ex parte Johnson** 286

3. **Objections—Presumption of Regularity.** Third. Objections to alleged errors, committed during a trial, must be made in apt time, so as to allow the trial court to rule upon the objections before action is taken. It is too late to complain after the trial is ended.

   Fourth. Every presumption must be indulged in in favor of the regularity of the proceedings of a court of record, and the burden is upon the party who would impeach that regularity to do so by the best evidence obtainable. **Johnson v. State** 321

4. **Withdrawing Case from Jury—Misconduct of Officer.** When a motion is made, supported by affidavit, to withdraw a case from the consideration of, and to discharge, a jury, on account of improper action of the officer who selected and summoned the jury, or the talesmen, and such motion is made as soon as the facts stated therein come to the knowledge of the defendant or his counsel, and the matters of fact therein stated are not denied under oath, they will be taken as confessed, and will be construed most strongly against the prosecution and in favor of the defendant. **Harjo v. U. S.** 590

VARIANCE—See "Indictment and Information," 8.
New indictment—See "Trial," 2.

VENUE—Effect of statehood—See "Jurisdiction."

Change—Discretion—Burden of Proof. First. An application for a change of venue is addressed to the sound discretion of the trial judge, and, in the absence of an abuse of this discretion, his judgment is not subject to review.
Second. The burden is upon the defendant to clearly show, upon an application for a change of venue, his inability to obtain a fair and impartial trial in the county in which the offense was committed. **Johnson v. State** 321

WAIVER—Of objections by failure to preserve record—See "Appeal and Error."

WEAPONS—Description in murder indictment—See "Indictment and Information," 2.

Regulation—Statutes—Bill of Rights. The provisions of the statutes of Oklahoma (sections 2502, 2503, Wilson's Rev. & Ann. St. Okla. 1903) prohibiting the carrying of the weapons therein set out are not repugnant to each other, or violative of section 26 of article 2 of the Bill of Rights of the Constitution of Oklahoma, but are valid provisions of such statutes extended to and put in force in the state by the provisions of section 21 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) and section 2 of the Schedule of the Constitution. **Ex parte Thomas** 210

WITNESSES—See "Evidence."

1. **Impeachment—Prior Consistent Statement.** It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before that relation or motive existed. **Driggers v. U. S.** 167

2. **Impeachment—Cross-Examination.** For the purpose of impairing the credibility of a witness, he may be asked, on cross-examination, if he has been convicted of a felony, or any crime involving a want of moral character; but it is improper to ask the witness if he has been indicted, arrested, or imprisoned, before the conviction of said witness, for any offense whatever. **Slater v. U. S.** 27
Price v. U. S. 2

3. **Failure to Obey Order of Exclusion.** A witness who violates the rule of the court, separating the witnesses and excluding them from the courtroom during the trial, by remaining in the courtroom during the most of the time

WITNESSES—Continued.

of the trial, is not thereby rendered incompetent as a witness. Such violation can only affect his credibility as a witness, or subject him to punishment for contempt of court. **Idem** 291

4. **Credibility—Evidence to Affect.** It is error on cross-examination, for the purpose of affecting the credibility of a witness, to ask as to whom he married, for the purpose of showing that he had married a woman with whom he had committed adultery. **Price v. State** 358

5. **Cross-Examination to Discredit—Specific Acts.** A witness for the defendant may be cross-examined as to specific acts tending to discredit her, when such facts are relevant to the issue. **Cannon v. Territory** 600

WRIT OF ERROR—See "Appeal and Error."

APPENDIX—Roll of Attorneys 713

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